IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| OFFICE OVERLOAD, INC., a Delaware corporation, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 79-C-231-C |
| HANNAH L. MILLER, JOHN H. MAXWELL, JR., DUNHILL PERSONNEL OF TULSA, INC., an Oklahoma corporation, and DUNHILL TEMPS, an association of unknown character, | ) | |
| Defendants. | ) | |

NOTICE OF DISMISSAL

Plaintiff, Office Overload, Inc., hereby dismisses the claims asserted in the Complaint against Defendant, Dunhill Temps, an association of unknown identity.

This Dismissal is without prejudice and Plaintiff retains any and all causes of action and claims it has against the Defendant, Dunhill Temps.

SNEED, LANG, ADAMS,
HAMILTON, DOWNIE & BARNETT

By _____
William J. Wenzel
Attorneys for Plaintiff
Fourth Floor
Thurston National Building
Tulsa, Oklahoma 74103
(918) 583-3145

CERTIFICATE OF MAILING

I, William J. Wenzel, do hereby certify that on the ____ day of _____, 1979, I mailed a true and correct copy of the above and foregoing Dismissal, with proper postage thereon prepaid, to A. Kent Morlan, Esq., Jones, Givens, Brett, Gotcher, Doyle & Bogan, Inc., Suite 400, 201 West Fifth Street, Tulsa, Oklahoma 74103.

_____
William J. Wenzel

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | No. 79-C-367-C |
| JERRY DALE GORDON, et al., Defendants. | ) | |



O R D E R

The plaintiff herein seeks foreclosure of a real estate mortgage given by the defendants Jerry Dale Gordon and Wilma Jean Gordon to the Small Business Administration. The other defendants allegedly hold liens against or other interests in the subject real property. Now before the Court is the Motion to Dismiss of the defendants Mildred Whiten and Lawrence J. Babb.

Ms. Whiten and Mr. Babb hold a tax deed on the subject property. Their Motion to Dismiss is based upon the plaintiff's failure to pay into court the taxes, penalties, interests, and costs assessed against the property as is required by Oklahoma law of one who seeks to cancel a tax deed. 68 O.S. § 24344.

The plaintiff contends that it does not seek to set aside the tax deed because the mortgage is in no way affected by the tax deed whether valid or invalid. The plaintiff asks the Court's permission to amend its Complaint to remove any indication that it would have the Court declare the tax deed to be null and void.

The plaintiff's contention is incorrect. When property is sold at a tax sale

> to a bona fide purchaser in good faith, without collusion, nor as the agent of the person obligated to pay the tax, a deed executed in pursuance thereof transfers a full and complete fee simple title to the purchaser. McDonald v. Duckworth, 197 Okla. 576, 173 P.2d 436, 439 (1946).

When the original owner is the purchaser at the tax sale, or where the property is reconveyed to him by a third person who purchases the property at the tax sale, the rights of a mortgagee would not be cut off. 173 P.2d at p.438-39. But "the equities existing against the original obligor may be cut off while the land is owned by . . . third parties . . ." Burnett v. Cole, 193 Okla. 25, 140 P.2d 1012, 1013 (1943).

A mortgage or other lien held by the State of Oklahoma would at all times be superior and not subject to a tax lien. 68 O.S. §24346. However, the Small Business Administration has waived its right to superiority in the case of tax liens on property. 15 U.S.C. §646. Section 646 was intended to "place the Small Business Administration's security claims against property in the several states upon the same level as those held by private parties." United States v. Clover Spinning Mills Co., 373 F.2d 274, 278 (4th Cir. 1966). Since the issuance of a tax deed to a third party cuts off the rights of a private mortgagee under state law, it would also cut off the mortgage rights of the Small Business Administration.

The plaintiff prays that its title in the subject real property be quieted. It claims that the tax deed held by the defendants is void and did not effect the passage of title to the defendants because of the failure of notice of the tax sale, and the failure of notice of defendants' intention to demand a tax deed. Plaintiff further alleges that unless the tax deed is cancelled, it will irreparably injure its title to the subject property. The amendment proposed by the plaintiff would be a futile gesture and would render its claim against the defendants dismissible. Because the plaintiff's rights are subordinate to those of the defendants as represented by their tax deed, the tax deed would have to be cancelled in order to quiet title in the plaintiff. Under such circumstances leave to amend need

not be granted. See Lann v. Hill, 436 F.Supp. 465, 469 (W.D.Okla. 1977).

> "[T]he tender statute applies whether the tax deed is valid, voidable or void, where the land is liable for taxation, has been assessed and extended upon the tax rolls in substantial compliance with the statute, and the taxes have not been paid." Sanford v. Perkins, 185 Okla. 484, 94 P.2d 533, 534 (1939).

Because the plaintiff has not made the required tender, its complaint against the defendants is subject to dismissal. 68 O.S. §24344.

For the foregoing reasons, it is therefore ordered that the plaintiff is hereby denied leave to file its Second Amendment to Complaint. It is further ordered that the Motion to Dismiss of the defendants Mildred Whiten and Lawrence J. Babb is sustained, and the plaintiff's complaint against said defendants is hereby dismissed without prejudice.

It is so Ordered this 27th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 28 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

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| UNITED STATES OF AMERICA for the use and benefit of EDDIES SALES AND LEASING, INC., d/b/a EDDIES WHITE TRUCK SALES, Plaintiff, | ) | |
| v. | ) | NO. 78-C-551-B |
| MID-STATES CONSTRUCTION OF DERBY, INC., et al., Defendants. | ) | |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law in the above-entitled case:

1. Prior to April 1, 1978, Utility Contractors, Inc., [Utility], entered into a contract with the United States of America through the U. S. Corps of Engineers entitled:

> Joe Creek Channel Improvement of Tulsa, Oklahoma, Contract No. DACW 56-78-C0078.

Said contract with the Corps of Engineers required Utility to provide a payment bond which was posted and provided by Utility through Federal Insurance Company, Bond No. 8073-33-71.

2. Utility entered into a subcontract arrangement with Mid-States Construction Company of Derby, Inc. [Mid-States] to perform and do certain work, principally excavation and dirt moving, on the Joe Creek project.

3. Bond No. 8073-33-71 issued by Federal Insurance Co. on behalf of Utility also covered Mid-States for the work Mid-States performed on the Joe Creek project.

4. In April of 1978, Carl Bybee, as President of Mid-States, entered into negotiations leading to execution of four agreements on May 20, 1978, with Eddies Sales and Leasing, Inc., [Eddies], whereby Eddies delivered to Mid-States six used Kenworth tractors, one used Beal tractor, seven used Load-King trailers, and two used International trucks with dump beds for the use by Mid-States in performance of its work on the Joe Creek project.

5. The parties used printed forms entitled "Rental Installment Contract--Security Agreement" for each of said agreements, which apparently are provided for use of Plaintiff by White Motor Credit Corporation for the installment purchase of motor vehicles and creation of security interests therein, instead of having properly drawn instruments to reflect their agreement. As a result, the parties produced what one of their attorneys has correctly described as " . . . the illegitimate off-spring of an abortive union between a sales agreement and a lease." The agreement was typed in the office of Eddies pursuant to a "lay-out" by Eddie Rypkema, president of the Plaintiff.

6. In preparation of the agreement, Rypkema deleted on the face of each agreement:

(a) the words "retail installment contract" and interlineated "lease installment"

(b) the word "contract" and interlineated "lease"

(c) the word "purchaser" and interlineated "lessee"

(d) the word "seller" and interlineated "lessor"

(e) the reference to White Motor Credit Corporation on the front page, but did not omit such reference from the reverse side specifying the secured rights of the "Seller" and the "Purchaser".

7. Said "Lease Installment" also provided for rental payments on June 10, 1978; June 19, 1970; and July 1, 1978; of $20,000.00; $30,000.00; and $15,000.00, respectively. Mid-States tendered to Lessor, Eddies, post-dated checks, dated June 10, 1978, and June 19, 1978, for the payments of $20,000.00 and $30,000.00, but said checks each were returned due to insufficient funds.

8. Within 90 days of the date materials were last used, furnished and supplied on the job, Eddies demanded from Mid-States, Utility, and Insurance Co., payment of said $65,000.00 by a letter dated July 17, 1978, addressed to Utility and Insurance Co., with a copy to Mid-States and the U. S. Corps of Engineers. This cause of action was brought before one year had elapsed since materials were last furnished by Eddies to Mid-States to be used on the Joe Creek project.

9. Federal Insurance Co. and Mid-States have refused to pay the $65,000.00 claiming that the agreements are for capital purchases, not leases, which are not covered by the Miller Act. Utility has refused to pay the $65,000.00 claiming it advanced that sum to Mid-States which didn't pay it to Eddies.

10. The four documents entitled "Lease Installment" are neither clear nor unambiguous. They probably are the most confusing and ineptly drawn agreements the Court has ever examined. The typed insertions conflict with its printed portions and all they really do clearly is name the parties, list the equipment and provide of $65,000.00 as "lease payments" in three installments and $12,000.00 a month thereafter for 24 months.

11. The Court finds that the parties intended a lease agreement rather than a purchase contract, because (a) Mid-States had no credit and could not finance the purchase of the tractors and trailers, (b) there is evidence that Rypkema was aware of his rights under the Miller Act if the property was leased, as opposed to an installment purchase contract, (c) the various insertions, coupled with the words, "This is a non-maintenance lease to supply equipment . . ." indicate intent to make a lease, and (d) although Rypkema's testimony was not particularly convincing, neither was that of Carl Bybee, which was directly opposed to it. However, Rypkema's testimony was corroborated by that of George Hunt. The Court therefore finds that the preponderance of the evidence establishes that the agreements were leases of equipment.

12. The term of the lease was from May 20, 1978, to July 1, 1980, or 24 months plus 40 days.

13. The fact that the certificates of title to the vehicles were placed in the name of Mid-States was for the convenience of the parties in licensing the vehicles.

14. The vehicles were repossessed by Eddies on June 28, 1978, when the insurance on the vehicles was cancelled, before the lease payment of $15,000.00 became due on July 1, 1978. Accordingly, there is due to the Plaintiff pursuant to said leases, and pursuant to the

provisions of the Miller Act, 40 U.S.C. § 270(a)-270(d), the sum of $50,000.00, being the $20,000.00 lease payment due June 10, 1978, and the $30,000.00 lease payment due June 19, 1978. Even though each of the four leases provides for an identical amount of payments, the Court finds that the parties intended only one lease at the payments aforesaid.

## CONCLUSIONS OF LAW

1. The parties are properly before the Court and this Court has jurisdiction and venue of this matter pursuant to the provisions of the Miller Act, 40 U.S.C.S. §§ 270(a) - 270(d).

2. The lease agreements (Plaintiff's Exhibits 4 through 7) are not clear and unambiguous. In view of this ambiguity, it is proper to ascertain the intention of the parties entering into the agreements by the parole evidence introduced at the trial.

3. The Miller Act applies if the trucks and trailers were furnished pursuant to a lease rather than a capital acquisitions arrangement. Continental Casualty v. Clarence L. Boyd, 140 F.2d 115 (10th Cir. 1944) was an action in which a lease agreement was entered into between Boyd and the contractor for the rental of certain dirt moving equipment. The Court permitted Boyd to recover on the lease payments, but refused to include certain items which were sold and which were not utilized on the federal project covered by the Miller Act bond. In Massachusetts Bonding & Ins. Co. v. United States, 88 F.2d 388 (5th Cir. 1937) a contractor originally purchased certain trucks from the plaintiff, but was unable to make the required payments. The seller took the trucks back for the balance of the purchase price but subsequently leased the same trucks for the duration of the federal project. The Fifth Circuit determined that the rental payments due were covered under the Miller Act bond and that as long as such rental was fair, the payments should be made. In the case at bar, the Court has determined that the agreements between Mid-States and Eddies were lease agreements for equipment, not capital acquisition agreements, consequently, the Miller Act applies.

4. The Miller Act applies to cases where a subcontractor has supplied to a contractor labor or material utilized on a government project. 40 U.S.C.S. § 270(b)(a). The Miller Act applies under the facts of the case at bar.

5. Eddies is entitled to judgment for $50,000.00 under the Miller Act. The purpose of the Miller Act was to afford protection to those persons who supply materials and labor to a contractor on a federal project, who cannot acquire lien rights because liens cannot attach to federal property. Sherman v. Carter, 353 U. S. 210 (1957). Furthermore, the Miller Act should be liberally construed, as the Honorable Frederick Daugherty stated:

> The Miller Act should be liberally construed to effectuate the purpose of the act as declared by Congress, and where materials are actually furnished for a project covered by a payment bond, the coverage should be allowed if notice is given and suit brought within the prescribed period.
>
> United States v. Smith Road Construction Co., 227 F.Supp. 315 (D.Okl. 1964)

6. All issues herein are found and concluded in favor of the Plaintiff and against the Defendants.

7. The Plaintiff should not be allowed attorney fees, but should be allowed its costs.

8. Plaintiff's motion to amend to assert a quantum meruit claim is denied.

Dated this 27th day of September, 1979.

Clarence A. Brimmer
United States District Judge, Assigned

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the use and benefit of EDDIES SALES AND LEASING, INC., d/b/a EDDIES WHITE TRUCK SALES,

Plaintiff,

v.

MID-STATES CONSTRUCTION OF DERBY, INC., et al.,

Defendants.

NO. 78-C-551-B

FILED

SEP 28 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The above entitled matter coming on to be heard this day by the Court, sitting without a jury, Plaintiff appearing by its attorney, Kevin M. Abel, Esq., Mid-States Construction of Derby, Inc., appearing by its attorneys, Don Gilder, Esq., and Leo C. Kelly, Esq., and Federal Insurance Company and Utility Contractors, Inc., appearing by Jay Baker, Esq., and Pat Daugherty, Esq., and the Court having heard the evidence of the parties and the arguments of counsel and being well advised in the premises and having filed its Findings of Fact and Conclusions of Law herein; it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff have judgment against the Defendants, and each of them, jointly and severally, for the sum of $50,000.00, interest, and costs excluding attorney's fees.

Done in Open Court this 27th day of September, 1979.

Clarence A. Brimmer
United States District Judge, Assigned

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| FARMERS INSURANCE COMPANY, INC., a corporation, Plaintiff, vs. CARL HERMAN WIITALA, STEPHEN TRIPPLET, VALHOMA INDUSTRIES, INC., a corporation, OKLAHOMA FARM BUREAU INSURANCE COMPANY, a corporation, Defendants. | ) | No. 78-C-501-C |



O R D E R

The Court now considers plaintiff's Motion for Summary Judgment. Plaintiff filed this action seeking this Court's declaratory judgment that it was not liable for any judgment against Carl Herman Wiitala in an action in the District Court of Tulsa County, State of Oklahoma, CT-77-865, styled John M. Carroll, Executor of the Estate of Frank M. Carroll, deceased, Plaintiff, versus Carl Herman Wiitala, an individual, Stephen Tripplet, an individual, and Valhoma Industries, Inc., a corporation, Defendants.

That lawsuit purportedly seeks recovery for personal injuries (and presumably wrongful death) as a result of an automobile accident on July 19, 1976. It is alleged that Carl Wiitala was driving a 1970 Chevrolet van that collided with Carroll's vehicle, that the van driven by Wiitala was owned by Valhoma Industries and entrusted to Valhoma's employee Stephen Tripplet, and that Carl Wiitala did not have the permission of the vehicle's owner, Valhoma Industries, to drive it. Plaintiff Farmers further alleges that it had issued an automobile liability insurance policy number 29 9729 7471 to Leonard Wiitala, father of Carl Wiitala, which policy listed Carl Wiitala as an insured. A purported copy

of the insurance policy is attached to the Complaint, and plaintiff points out that pertinent portions state that the policy does not cover otherwise insured parties when driving a vehicle without the permission of the owner. See Plaintiff's Brief in Support of Motion for Summary Judgment filed March 9, 1979, p.4. Plaintiff also refers to testimony by deposition of Stephen Tripplet stating Carl Wiitala did not have the permission of Valhoma Industries to drive the Chevrolet van, and that he, Stephen Tripplett, did not have Valhoma's permission to allow Carl Wiitala to drive the van. Tripplett's testimony further indicates that the Valhoma van had been loaned to him to drive back and forth to work while his car was being repaired, and that he and Wiitala used it for a personal trip from Tulsa to Kansas City, Missouri, where they attended a music concert. See Plaintiff's Brief in Support, March 9, 1979, pp. 2-3. Plaintiff alleges that Valhoma had insured this van with Oklahoma Farm Bureau Insurance Company, policy Number 850-585-0105, and that Oklahoma Farm Bureau denies any liability in that Carl Wiitala did not have Valhoma's permission to drive the vehicle, which allegedly precluded coverage by the Oklahoma Farm Bureau policy. Plaintiff seeks a declaratory ruling that it is not contractually bound to defend Carl Wiitala in that his driving of the Valhoma vehicle was without the owner's permission.

Carl Wiitala responds to plaintiff's motion for summary judgment that this action may not proceed without the presence of a necessary and indispensable party, John M. Carroll, executor of the estate of Frank J. Carroll, the party who was killed in the collision with the Valhoma van. John Carroll is the plaintiff in the state court action against Wiitala, Tripplett, and Valhoma (CT-77-865), and Wiitala argues that Carroll's interests are at stake in this action and that he is an indispensable party. Wiitala further

argues that joinder of Carroll would defeat diversity, and that this action must therefore be dismissed under Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); and City of Indianapolis v. Chase National Bank of New York, 314 U.S. 63 (1941).

Rule 19 of the Federal Rules of Civil Procedure covers the Joinder of Persons Needed for Adjudication, providing in pertinent part:

> (a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> (b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In its discussion of joinder in declaratory actions, Moore's treatise on federal practice states that

> [i]n an action by the insurance company against the insured for a declaration of non-liability under a liability policy, it

> has been stated that the injured persons, who are asserting claims against the insured, are merely proper parties and need not be joined. Other courts have taken the position that they are necessary parties. The first view is perhaps technically correct, since the primary dispute is between the insurer and the insured as to the former's liability under the policy. But injured persons have such an interest in the litigation that they normally should be joined.
>
> 6A Moore's Federal Practice, ¶ 57.25 (2d ed.) (footnotes omitted).

Defendant Wiitala refers the Court to Ranger Insurance Company v. United Housing of New Mexico, Inc., 488 F.2d 682 (5th Cir. 1974), a persuasive case on point holding that an injured third party was indispensable to a declaratory action between the insured and the insurer. That court also noted, however, that

> [t]he theory is that the declaratory judgment remedy is inherently discretionary due both to its equitable nature and the permissive wording of the Declaratory Judgment Act, 28 U.S.C.A. § 2201 (1959). Thus, it is argued, a district court's power to dismiss for failure to join a party in a declaratory judgment action is not restricted to that provided by Rule 19(b) of the Federal Rules of Civil Procedure.
>
> 488 F.2d at 683.

Plaintiff refers the Court to an appeal from a Western District of Oklahoma decision, State Farm Mutual Automobile Insurance Co., v. Mid-Continent Casualty Co., 518 F.2d 292 (10th Cir. 1975), a case not on point, holding that the lessee of a rental automobile who was an indirect insured under the lessor's policy was not an indispensable party in an action by his insurer against automobile lessor's insurer for a declaration of liability. There is perhaps an analogy here to the instant case, but not one so strong as to suggest an applicable rule in the Tenth Circuit.

The Court is not persuaded by plaintiff's argument that John M. Carroll "has no interest in the present action since it is limited to the interpretation of the policy's definition of insured." Plaintiff's Supplemental Brief, filed April 16, 1979, p.4. Carroll's obvious interest is that of having

an insured motorist as the defendant in Carroll v. Wiitala, CT-77-865. If anyone has an interest in plaintiff's liability for Wiitala's alleged negligence, it is the injured party, here represented by Mr. Carroll.

Finally, the Court would note the analysis of factors relevant to indispensability offered in Ranger. After listing the factors cited in Rule 19(b), the Ranger court stated:

> In applying these factors we are mindful of the rule that:
>
> "Where an initial appraisal of the facts reveals the possibility that an unjoined party is arguably indispensable, the burden devolves upon the party whose interests are adverse to the unjoined party to negate the unjoined party's indispensability to the satisfaction of the court."
>
> Boles v. Greenville Housing Authority, 6 Cir., 1972, 468 F.2d 476, 478 (Tuttle, J., sitting by designation).
>
> 488 F.2d at 683.

The court then applied those rules to the case before it:

> As for the first factor, the district court considered it "nonsensical to suggest that a declaration, in this Court, of liability or non-liability will have no practical effect upon the [claimants]," given the possibility (now an actuality), of their obtaining a judgment against the insureds. While a judgment in favor of the appellant probably would not operate to bar the absent claimants from proceeding under the policy's direct action clause, we are satisfied that the claimants' interests would be prejudiced. For example, they would have to contend with the stare decisis effect of such a judgment, or they might be forced to litigate its effect on the direct action clause.
>
> Conceivably the district court could shape relief to avoid seriously prejudicing the absent claimants, possibly by enjoining appellant from raising its judgment of noncoverage as a defense to a direct action. However, at this point the basic difficulty with appellant's case becomes apparent -- either a judgment might prejudice the claimants, violating the first Rule 19(b) factor, or it would not be adequate to finally resolve the issue, violating the third Rule 19(b) factor. Neither alternative is acceptable.
>
> The third factor has been authoritatively construed to refer to the public interest in efficient, nonrepetitive litigation. Provident Trademens Bank & Trust Co. v. Patterson, 1968, 390 U.S. 102, 111, 88 S.Ct. 733, 738, 19 L.Ed.2d 936, 946. We think it clear that this factor weighs heavily against appellant -- assuming, as we must, that any judgment would be shaped

> to avoid prejudice to claimants, they could force relitigation of the very issue here involved, that of whether the appellant is liable under its insurance contract.
>
> Finally, we are not convinced that the appellant is without an adequate alternative remedy. It could seek its declaratory judgment in the state courts of Texas, where the claimants could be joined without destroying jurisdiction. We are aware that Texas courts apply strict standards to avoid issuing contingent, advisory opinions through the declaratory judgment procedure, but the fact that claimants have actually obtained a judgment against an insured apparently renders the coverage issue justiciable under Texas law. Cf. Firemen's Ins. Co. v. Burch, S.Ct.Tex. 1968, 442 S.W.2d 331.
>
> In sum, the appellant has failed to carry its burden of establishing that this case would not prejudice absent parties or that it would not be wasteful, uneconomical litigation that could be more efficiently conducted in another forum.
>
> Id. at 683-684.

The above analysis is, as to the first three points, directly applicable to the instant case.

As was the Ranger court, this Court is of the opinion that plaintiff has failed to carry its burden of establishing that further litigation of this case would not prejudice the absent party Carroll.

For the foregoing reasons, it is hereby ordered that this action be dismissed for failure to join John M. Carroll, a party indispensable to this litigation.

It is so Ordered this 27th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



JACKIE E. ROBERSON,

Petitioner,

v.

WILLIAM J. WHISTLER, et al.,

Respondents.

No. 78-C-453-D

O R D E R

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Jackie E. Roberson. This cause was originally assigned to the Honorable Allen E. Barrow who died during the pendency of the proceeding. The cause is now assigned to the undersigned United States District Judge.

Petitioner, when the § 2254 petition was filed, was held prisoner in the Rogers County Jail, Claremore, Oklahoma, facing prosecution in five cases, that is, CRF-76-126, CRF-76-127 and CRF-76-128, each charging armed robbery; CRF-76-190, charging injuring public property; and CRF-76-467, charging escape from jail. Petitioner contended that he was held in violation of his right to a speedy trial, and to due process of law in that the time limits of the Interstate Agreement on Detainers Act, 22 O.S.A. § 1345, et seq., were not met.

From review of the file the Court finds that the sequence of events to date in the petition under consideration are as follows:

Petitioner was incarcerated in the California State Penitentiary for men at Chino, California, in 1977, where detainers were placed on him by the Rogers County authorities.

Petitioner wrote to the Rogers County District Judge, Prosecutor and Court Clerk on August 5, 1977, and again September 8, 1977, requesting to be returned to Oklahoma and given a speedy trial on the Oklahoma charges.

Oklahoma became a party state to the Interstate Agreement on Detainers Act, 22 O.S.A. § 1345, et seq., effective October 1, 1977.

On November 6, 1977, the Rogers County Sheriff's Department again notified the California authorities of their detainers and their request for custody of the Petitioner.

On November 30, 1977, Petitioner signed documents approving his return to Rogers County, Oklahoma, for trial, which were mailed to Oklahoma on December 6, 1977.

Petitioner arrived in Oklahoma on April 20, 1978, for prosecution on the pending charges and counsel was appointed for him on April 21, 1978.

A motion to dismiss for failure to abide by the time limits of the Interstate Agreement on Detainers Act was filed by counsel on Petitioner's behalf on April 24, 1978, in the District Court of Rogers County in all five criminal cases, hearing was held on April 25, 1978, and order overruling dismissal entered May 4, 1978.

Petitioner's counsel then filed a petition for writ of mandamus and prohibition, Case No. 0-78-236, in the Oklahoma Court of Criminal Appeals seeking dismissal of the criminal charges on the ground that the time limitations of the Interstate Agreement on Detainers Act had not been met. The petition was denied by order dated and filed August 14, 1978.

Petitioner promptly filed the § 2254 petition now under consideration in this Court.

Five days thereafter, pursuant to a plea agreement, Petitioner pled guilty in CRF-76-190, to injuring public property, and was sentenced to three years imprisonment, and the four remaining charges were dismissed with prejudice by orders dated September 18, 1978.

Respondents have filed a motion to dismiss herein contending that Petitioner is no longer held in Rogers County Jail and his § 2254 petition is moot.

Petitioner faces a three year sentence in Oklahoma when his sentence in California is completed. His contention regarding the time limits of the Interstate Agreement on Detainers Act has been presented and decided by the District Court and Court of Criminal Appeals of Oklahoma. The Supreme Court of the United States has held that once the substance of a federal habeas corpus claim has been "fairly presented" to the state courts, the exhaustion requirement has been satisfied. Picard v. Connor, 404 U.S. 170, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Also see, Sandoval v. Rodriguez, 461 F.2d 1097 (Tenth Cir. 1972); Chavez v. Baker, 399 F.2d 943 (Tenth Cir. 1968), cert. denied 394 U.S. 950 (1969). This contention having been raised prior to Petitioner's plea of guilty is thereby preserved for consideration. See, United States v. Palmer, 574 F.2d 164 (Third Cir. 1978), cert. denied 437 U.S. 907; Gray v. Benson, 458 F.Supp. 1209, 1215 (D.C.Kan. 1978), which cases although dealing with § 2255 motions are analogous on this point. Therefore, under and limited to the circumstances before the Court, the Court should determine whether Petitioner is entitled to the relief sought in his § 2254 petition on the ground that the state criminal charges should have been dismissed without prosecution under the provisions of the Interstate Agreement on Detainers Act, 22 O.S.A. § 1345, et seq.

The pertinent provisions of the Interstate Agreement on Detainers Act, 22 O.S.A. § 1345, et seq., are in Article III, § 1347, regarding request by a prisoner to be tried on charges pending in another state:

> "(a) . . . he [prisoner] shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for final disposition to be made of the indictment, information or complaint; . . . "

In Article IV, § 1347, regarding a request by an officer of a state where charges are pending for temporary custody of a prisoner in another state for prosection on the pending charges:

> "(c) . . . trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, . . ."

In Article V, § 1347:

> "(c) . . . in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

These provisions may logically be computed only from the effective date of October 1, 1977, that Oklahoma became a party state to the Interstate Agreement on Detainers Act. Under § 1347(a) of the Act, 180 straight days, with no time excluded, would have expired May 5, 1978, and the prosecution started April 21, 1978, prior to expiration of the 180 day limitation. Under § 1347(c), the state authorities proceeded within reasonable periods of time. The Act was effective October 1, 1977, request for the Petitioner was made November 6, 1977, and Petitioner could not have been moved prior to thirty days thereafter pursuant to the Article IV(a), § 1347, provision that ". . . there shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." Petitioner arrived in Oklahoma on April 20, 1978, and the prosectution commenced the next day, well within the 120 day limitation of § 1347(c) of the Act.

The pending motion that the state charges should have been dismissed for failure to meet the time limitations of the Interstate Agreement on Detainers Act is without merit.

Petitioner presents a closely related second ground for relief that he was denied a speedy trial. This claim has not been presented to the state courts for determination and the petition before this Court should be denied without prejudice on this ground until adequate and available state remedies have been exhausted.

The State of Oklahoma provides remedies to resolve Petitioner's claim by post-conviction procedure pursuant to 22 O.S.A. § 1080, et seq., and by habeas corpus pursuant to 12 O.S.A. § 1331, et seq.. Until Petitioner has availed himself of the adequate and available procedures through the highest state court, his state remedies are not exhausted and his petition to this federal court is premature. 28 U.S.C. § 2254(b). No principle in the realm of federal habeas corpus is better settled than the state remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (Tenth Cir. 1970); Preiser v. Rodriguez, 411 U.S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (Tenth Cir. 1972), cert. denied 410 U.S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the state courts. Whiteley v. Meacham, 416 F.2d 36 (tenth Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (Tenth Cir. 1970), cert. denied 400 U.S. 1010 (1971).

Moreover, as to both claims presented herein it appears that the same may be and were in fact waived by Petitioners plea of guilty to the conviction and three-year sentence under attack.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Jackie E. Roberson be and it is hereby denied as to the claim that the time limitations of the Interstate Agreement on Detainers Act were not met, and it is denied, without prejudice, as to the denial of a speedy trial claim, and the case is dismissed.

Dated this 28 day of September, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| | ) | |
| HOME-STAKE PRODUCTION COMPANY, ET AL., | ) | |
| | ) | |
| Debtor. | ) | |
| | ) | |
| THE HUNTINGTON CORPORATION, FORMERLY TORAX, INC., | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 78-C-260-D |
| | ) | |
| HOME-STAKE PRODUCTION COMPANY, ET AL., | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

O R D E R

This is an appeal from an order entered on November 2, 1977, by the Bankruptcy Judge in case No. 73-B-922. The order concerns applications for fees and reimbursement of expenses. By this order, Torax, Inc., now The Huntington Corporation, was directed to pay to the Trustee of Home-Stake Production Company the sum of $7,398.42. This sum was to be credited to the 1970 accumulated program funds. On appeal to the District Court, the matter was referred to the United States Magistrate, whose Findings and Recommendations were filed January 15, 1979. The Magistrate recommended that the judgment of the Bankruptcy Court be affirmed.

As stated in its order, the Bankruptcy Court found that although a significant portion of the time and effort of the applicants significantly benefitted the Debtor estate, the balance of the time and effort primarily benefitted the participants in various programs rather than the estate as a whole, and that while compensation from the estate was proper for those efforts benefitting the estate, compensation for those efforts which primarily benefitted the participants in the various programs was properly paid out of funds accumulated for the participants. Payment from these accumulated funds was to be on a basis proportional to the funds accumulated.

The Bankruptcy Court also concluded that "under all of the circumstances involved in the many protracted issues which have been part of this reorganization proceeding," it would be fair and equitable to allow this proportional payment "regardless of whether any specific program was involved directly in the matters covered by the work performed."

Paragraphs 12 and 13 of the order of the Bankruptcy Court deal specifically with the payments to be made from the 1970 fund, with which this appeal is concerned:

> 12. Fees and disbursements of the law firm applicants with respect to the registration of participant ownership with the Superintendent of Foreign Investments of Venezuela and with respect to compliance hearings involving Talon and Hideca, as shown in the applications, should be charged solely against funds accumulated for 1970 Participants. The amount of such fees and expenses is $54,697.38. Funds held for distribution to Participants who sold their 1970 units to Torax, Inc. in 1974 should bear no part of those fees and disbursements.
>
> 13. Distributions to the Debtor estate for the 1970 Program participants by Talon since February 16, 1974, did not include distributions allocable to the 102.5 units purchased by Torax, Inc. which were retained by Talon and delivered directly to Torax, Inc. Thus, funds accumulated by the Trustee for distribution to 1970 Program participants are bearing a portion of the fees and expenses which should be borne by Torax, Inc. The amount of the fees and expenses properly chargeable to Torax, Inc. is $7,398.42; and Torax, Inc. should be ordered to pay that amount to the Trustee for credit to the 1970 accumulated program funds.

The Huntington Corporation presents three issues in this appeal:

> 1.) Whether the Bankruptcy Court had jurisdiction to enter an order as to Huntington Corporation;
>
> 2.) Whether proper notice of the hearings which resulted in this order was given to Huntington Corporation; and
>
> 3.) Whether the Bankruptcy Judge was correct in ordering Huntington Corporation to contribute to the 1970 fund from which the payments in question were to be made.

In its consideration of this appeal, the Court must, of course, keep in mind the policy embodied in Chapter X, and

the purposes for which it was enacted. As a remedial statute that aims at rehabilitation, it is to be liberally construed, and its purposes should not be defeated by narrow and technical interpretations, see, e.g., Sherr v. Winkler, 552 F.2d 1367 (Tenth Cir. 1977); Campbell v. Allegheny Corp., 75 F.2d 947 (Fourth Cir.), cert. denied, 296 U.S. 581 (1935); 6 Collier on Bankruptcy ¶0.11.

In order to effectuate the provisions of Chapter X, Bankruptcy courts are given very broad powers. In 6 Collier on Bankruptcy ¶3.05 at 421-422 it is said:

> In corporate reorganization, as in ordinary bankruptcy, the court clearly has summary jurisdiction over all matters of administration beginning with the filing of the petition and ending with the entry of the final decree -- matters such as the proof and allowance or disallowance of claims, classification of creditors and stockholders, approval of compromises, appointment of receivers and trustees, approval and confirmation of the plan, examination and investigation of the debtor, determination of fees and allowances, and the like. (footnotes omitted).

See also, e.g., Pepper v. Litton, 308 U.S. 295 (1939); In re Federal Shopping Way, Inc., 457 F.2d 176 (Ninth Cir. 1972); In re Imperial "400" National, Inc., 429 F.2d 671 (Third Cir. 1970); Diners Club, Inc. v. Bumb, 421 F.2d 396 (Ninth Cir. 1970); In re Black Ranches, Inc., 362 F.2d 19 (Eighth Cir), cert. denied sub nom. Black v. Brando, 385 U.S. 990 (1966).

The Bankruptcy Court found that the distributions to the debtor estate for the 1970 Program participants by Talon did not include these distributions allocable to the units purchased by Torax (the Huntington Corporation), but that these distributions were retained by Talon and delivered directly to Torax. Had these funds been paid to the Trustee, they would now be part of those accumulated by the Trustee for the 1970 Program participants, and would bear their proportionate share of the fees and disbursements ordered by the Bankruptcy Court. The order directed to Torax essentially directs that it pay that portion of the fees and disbursements

which would have been allocable to these distributions had they been paid to the Trustee by Talon.

The Huntington Corporation cites Berry v. Root, 148 F.2d 945 (Fifth Cir.), cert. denied, 326 U.S. 755 (1945), for the proposition that a court of bankruptcy is without authority to impose upon creditors the "personal liability to pay attorneys employed by other creditors." The court in that case at 148 F.2d 948 said:

> We find no precedent or authority for a court of bankruptcy, with no estate before it, to assess money contributions against creditors as a personal liability to pay attorneys employed by other creditors for defeating the bankruptcy proceeding.

This is true as a general proposition, but Huntington's reliance is misplaced. The Bankruptcy Court's order does not direct Huntington to pay attorney fees to anyone; rather, it directs it to return to the Trustee a certain proportion of the funds that have been paid to it, for credit to the 1970 Program funds. The power of the Bankruptcy Court to order the return of funds properly belonging to the debtor estate, as shown by the authorities cited supra, is not questionable.

A court of bankruptcy is vested with extensive powers under Chapter X to review all fees and expenses incurred in connection with the reorganization. See generally 6A Collier on Bankruptcy ¶¶13.01--13.19; 13A Collier on Bankruptcy ¶¶10-215.01--10-215.13.

The Bankruptcy Court has jurisdiction to order the return of funds which have been paid out of the debtor estate after the petition is filed, and that the court's power over these funds is not diminished by the fact that they pass to third parties. Such property is deemed to be in the constructive possession of the debtor estate, and the court may exercise its full jurisdiction over it. See, e.g., In re National Motorship Corp., 96 F.2d 88 (Second Cir. 1938), cert. denied, 305 U.S. 610; In re Retail Stores

Delivery Corp., 5 F.Supp. 892 (S.D.N.Y. 1933); 2 Collier on Bankruptcy ¶¶23.01-23.11; 6 Collier on Bankruptcy ¶¶3.01-3.17.

The Court is accordingly of the opinion that the Bankruptcy Court had jurisdiction over these distributions and that it had jurisdiction to determine the questions of the proration and allocation of fees and expenses.

The notice of the hearing on fees and expenses, filed October 11, 1977, provided notice that the fees and expenses sought were to be recovered either from the debtor estate or the "proceeds distributable to participants in the several programs." Notice of a hearing on allowances of compensation and reimbursement is required by Rule 10-209, Bankruptcy Rules. Although formal notice is evidently contemplated by this rule, and is definitely the proper and preferred practice, the considerations present in a proceeding as complex as the one involved herein, and the number of parties involved, dictate that under some circumstances actual or constructive notice might suffice, see, e.g., In re Intaco Puerto Rico, Inc., 494 F.2d 94, at 99 n.11 (First Cir. 1974). General knowledge of the pendency of the reorganization is, in itself, insufficient, New York v. New York, N. H. & H. R.R., 344 U.S. 293 (1953), but general knowledge of the proceeding coupled with actual knowledge of the particular development in question may rise to the level of reasonable notice under the circumstances. In re Intaco Puerto Rico, Inc., supra. The Huntington Corporation does not deny that Torax acquired its interest in the 1970 Program from the participants then involved in it, nor does it deny that its share of the 1970 Program distributions were paid directly to it, rather than to the Trustee, by Talon, nor does it deny having any knowledge at all of this proceeding. It states in its brief that through its attorneys it received informal notice of the hearing.

The form of notice required in reorganization proceedings is not strictly prescribed. Its form and manner is left

largely to the discretion and judgment of the court, so as to provide the court with the flexibility to tailor the notice given to meet particular situations, see, 11 U.S.C. §520 (§120 of the Bankruptcy Act); Rule 907, Bankruptcy Rules. Under the proper circumstances, even informal or constructive notice can be sufficient, e.g., In re DCA Development Corp., 489 F.2d 43 (First Cir. 1973). The court therein also noted that the "court in each case must balance the individual's interest in adequate procedure against the overall interest of efficient final resolution of claims. . . The latter interest is particularly important in proceedings under the Bankruptcy Act, where delay can often result in diminution of corporate assets with no corresponding benefit to creditors." 489 F.2d at 46.

The Huntington Corporation also argues that it did not individually benefit from these services the Bankruptcy Court found that inured to the benefit of the 1970 Program, and that it therefore should not be required to bear its proportional share of these expenses. The Bankruptcy Court found that certain efforts benefitted the debtor estate as a whole, but that they also benefitted the various programs involved, which programs should bear a proportional share of the costs. This included the 1970 Program; Torax, in obtaining its interest from the participants, became involved in this Program.

The power to review all fees and expenses includes all fees and expenses "from whatever source they may be payable." Woods v. City Bank Co., 312 U.S. 262, 267 (1941).

In Leiman v. Guttman, 336 U.S. 1 (1949), the Court said:

> We reviewed in Woods v. City Bank Co., 312 U.S. 262, and Brown v. Gerdes, 321 U.S. 178, the design of Ch.X insofar as fees and allowances payable out of the estate. Here we are dealing with fees which are incident to the reorganization but not payable out of the estate. Under the less comprehensive language of §77B the leading authority was that

> the bankruptcy court had jurisdiction over the latter claims as well. In re McCrory Stores Corp., 91 F.2d 947. We would be unmindful of history and heedless of statutory language if we held that the power of the bankruptcy court in this respect had been contracted as a result of Ch.X.
>
> The control of the judge is not limited to fees and allowances payable out of the estate. Section 221(4)(1) by "the debtor" or (2) "by a corporation issuing securities or acquiring property under the plan" or (3) "by any other person" for services rendered "in connection with" the proceeding or "in connection with" the plan and "incident to" the reorganization. (footnotes omitted).

336 U.S. at 4-5. See also In re First Home Investment Corp. of Kansas, Inc., 368 F.Supp. 597, 601 (D.Kan. 1973). The Bankruptcy Judge made his determination as to the benefits of various efforts from his consideration of the applications and the hearing. He has also had the opportunity to observe the efforts of the applicants in the litigation and administration of the reorganization, and the effect of those efforts. Nothing has been shown which would indicate an abuse of discretion, and there is sufficient evidence in the record to support the Bankruptcy Court's Order.

For the foregoing reasons, the Court is of the opinion that the objections of Plaintiff Huntington Corporation to the Findings and Recommendations of the Magistrate be and hereby are overruled, and that the Order of the Bankruptcy Court of November 2, 1977, be and hereby is affirmed.

It is so Ordered this 28th day of September, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| ROBERT S. GAREL, Defendant. | ) | CIVIL NO. 79-C-545-C |

DEFAULT JUDGMENT

This matter comes on for consideration this 27 day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Robert S. Garel, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Robert S. Garel, was personally served with Summons and Complaint on August 29, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Robert S. Garel, for the sum of $2,378.13 plus the costs of this action accrued and accruing.

(Signed) H. Dale [illegible]

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| MICHAEL D. HARDING, a/k/a MICHAEL DEAN HARDING, Defendant. | ) | CIVIL NO. 79-C-547-C |



DEFAULT JUDGMENT

This matter comes on for consideration this 27 day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Michael D. Harding a/k/a Michael Dean Harding, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Michael D. Harding, a/k/a Michael Dean Harding, was personally served with Summons and Complaint on August 30, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Michael D. Harding, a/k/a Michael Dean Harding, for the sum of $732.00, plus the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| CHARLES N. KYLE, Defendant. | ) | CIVIL NO. 79-C-551-C |



DEFAULT JUDGMENT

This matter comes on for consideration this 27 day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Charles N. Kyle, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Charles N. Kyle, was personally served with Summons and Complaint on August 29, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Charles N. Kyle, for the sum of $748.33 as of August 15, 1979, plus interest from and after said date, and the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| DEBRA L. KARR, | ) | CIVIL NO. 79-C-541-C |
| Defendant. | ) | |



DEFAULT JUDGMENT

This matter comes on for consideration this _____ day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Debra L. Karr, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Debra L. Karr, was personally served with Summons and Complaint on August 28, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Debra L. Karr, for the sum of $1,001.68 as of August 15, 1979, plus interest from and after said date, and the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GAIL P. ANDERSON,

Plaintiff,

v.

SAINT FRANCIS HOSPITAL,
A Corporation,

Defendant.

NO. 77-C-350-B

JUDGMENT

The above-entitled matter, having regularly come on this day for trial, Plaintiff appearing in person and by her attorney, Nathan G. Graham, Esq., and the Defendant appearing by its attorney, Carl D. Hall, Jr., Esq., and the Court having heard the evidence adduced by each of the parties, and the arguments of counsel, and having considered the briefs of the parties on file herein, and being well-advised in the premises and having filed herein its Findings of Fact and Conclusions of Law; it is

ORDERED that the Plaintiff take nothing by her action in the above-entitled case, and that it be dismissed, with prejudice, each party to bear her or its own cost.

Done in Open Court this 26th day of September, 1979.

Clarence A. Brimmer
United States District Judge, Assigned

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GAIL P. ANDERSON,

Plaintiff,

v.

SAINT FRANCIS HOSPITAL, A Corporation,

Defendant.

NO. 77-C-350-B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, after hearing the evidence and arguments of the parties, makes the following Findings of Fact and Conclusions of Law in the above-entitled cause:

1. Defendant, Saint Francis Hospital, is a non-profit, general full service, acute short-stay, seven hundred and fifty (750) bed hospital, located in Tulsa, Oklahoma.

2. Defendant is engaged in the business of providing hospital level of care 365 days a year, 24 hours a day, and is staffed by approximately 2,400 employees.

3. Plaintiff, Gail P. Anderson, is a black female.

4. Throughout Plaintiff's employment with Defendant, Plaintiff was employed by the Defendant as a Quality Control and Preventive Maintenance Technician, having been first hired in November, 1973, and she was the only incumbent in the position of Quality Control and Preventive Maintenance Technician.

5. In April, 1975, the Defendant's leave of absence policy was as follows:

> A leave of absence is a leave of more than thirty (30) days, but less than one (1) year, at the end of which the employee can be considered for placement in comparable jobs at the first available opening. All employees who find it necessary to take a leave of absence may first exhaust their accrued vacation and sick leave benefits before the effective day of their leave of absence.

6. In February, 1975, Plaintiff requested a leave of absence for maternity reasons for the period of April 28, 1975, through July 7, 1975. Defendant then had no specific leave of absence provisions for maternity leave. Plaintiff asked for a leave of absence

for maternity reasons and it was granted routinely. Under this policy, the Defendant did not guarantee the reemployment of any employee taking a leave of absence because of its overriding need to fill vacancies to provide patient care.

7. During the period of March 21, 1975, through April 28, 1975, while Plaintiff performed no work for the Defendant, she received her normal paycheck from the Defendant, which represented payment to her of her earned sick leave and vacation benefits.

8. On April 27, 1975, Defendant hired Ruth Moss, a white female, as a regular, full-time Quality Control and Preventive Maintenance Technician.

9. When Plaintiff returned from her leave of absence on or about July 3, 1975, Ruth Moss still occupied the position of Quality Control and Preventive Maintenance Technician.

10. Since the position formerly held by Plaintiff was occupied by another employee, Plaintiff was thereafter offered the position of Phlebotomist in Defendant's Pathology Laboratory, and also the position of "media maker", both of which were at Grade 8, but Plaintiff refused to return to work for Defendant as a Phlebotomist or as a "media-maker" because she would not accept less than a Grade 14 position. A Quality Control and Preventive Maintenance Technician is in Labor Grade 14.

11. In July, 1975, there were no Grade 14 jobs open for which Plaintiff was qualified.

12. Plaintiff was not refused the right to return to work as a Quality Control and Preventive Maintenance Technician because of her race. The only evidence relating thereto is a conversation of Plaintiff with the laboratory director in 1974, and that evidence is entirely conjectural and could relate to her relations with fellow employees rather than race.

13. Defendant has a 13.5 per cent minority ratio of employees. It has no policy, direct or indirect, of hiring employees on the basis of race, and has had no history of race discrimination. There

are other employees in the laboratory in which the Plaintiff worked who are black.

14. In October, 1975, Ruth Moss quit the job and the supervisor of the laboratory attempted to contact Plaintiff by telephone, but received a recorded message indicating that she had moved. One Kay Hill, a black, was then hired for the job on November 12, 1975, and now holds it.

15. The Plaintiff is still considered by the hospital as being on a leave of absence, which was extended because the Defendant's Director of Personnel, an American Indian, felt that the job of Quality Control and Protective Maintenance Technician was of such a special nature that she should be continued indefinitely on leave of absence so that it could be offered to her if it should again become vacant and Plaintiff could be readily found.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and the parties.

2. Plaintiff has failed to sustain her burden of proof that Defendant denied her the opportunity to return to work from her leave of absence because of her race in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000(e)-3(a)(1)).

3. Defendant's maternity leave policy and practice was non-discriminatory in nature and operation. McGaffney v. Southwest Miss. Hospital, 5 FEP cases 1312 (D.C.S.D.Miss. 1973).

4. Defendant is entitled to judgment, each party to pay her or its own costs.

Dated this 26th day of September, 1979.

Clarence A. Brimmer
United States District Judge, Assigned

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA, and CONRAD CARSON, Revenue Officer, Internal Revenue Service, Petitioners, | ) | |
| vs. | ) | No. 78-C-461-D |
| GLENN O. YOUNG, Respondent. | ) | |



O R D E R

The Court has before it Respondent's "Motion for New Trial Under Rule 59 and Alias Motion to Vacate Orders of April 20, 1979 and Motion to Vacate of July 16, 1979."

The file discloses that this action to enforce a summons of the Internal Revenue Service was commenced on September 15, 1978. An order directing Respondent to show cause why this summons should not be enforced was entered on September 19, 1978. A hearing was had before the late Honorable Allen E. Barrow on October 12, 1978. By Order entered November 7, 1978, Judge Barrow found that the criteria set forth in United States v. Powell, 379 U.S. 48 (1964) had not been met, and refused to enforce the summons, but stayed the action, pending further order of the Court, rather than dismissing it.

After Judge Barrow's death, the case was assigned to the undersigned judge, pursuant to the authority of Rule 63, Fed.R.Civ.P. Upon consideration of the case, it was determined that no purpose was served by continuing to stay the action, and the case was accordingly dismissed without prejudice by Order dated April 20, 1979. Respondent filed a motion on April 25, 1979, which this Court treated as a motion under Rule 59, Fed.R.Civ.P., and which was overruled by Order of July 16, 1979.

Respondent's present motion, filed July 25, 1979, insofar as it purports to rely directly upon Rule 59 is untimely and must be denied. Rule 59, Fed.R.Civ.P.; Sutherland v. Fitzgerald, 291 F.2d 846 (Tenth Cir. 1961); 11 Wright & Miller §2812. Respondent's motion, therefore, will be treated as a motion that this Court reconsider its Order of July 16th.

Respondent has shown this Court nothing to justify or require modification or vacation of its orders of April 20, 1979, or July 16, 1979, and the Court, upon inspection of the file and the transcript of the proceedings had before Judge Barrow, can find nothing which would require that this case be re-opened.

Respondent's arguments wherein he contends that the assignment of this case to the undersigned judge deprived him of due process are meritless.

The Court finds that the orders to which Respondent refers were not improvidently entered, that Respondent was afforded full due process of law in this action, and that there is ample evidence to support the order dismissing this case without prejudice.

IT IS THEREFORE ORDERED that Respondent's motion be and is hereby denied.

It is so Ordered this 26 day of September, 1979.

FRED DAUGHERTY
United States Dsitrict Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL RAYFAEL BURKS, Petitioner,

v.

NORMAN B. HESS, Warden, et al., Respondents.

NO. 79-C-352-D

O R D E R

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner, a prisoner in the Oklahoma State Penitentiary, McAlester, Oklahoma. A brief background of the circumstances leading to the petition is as follows:

On June 16, 1975, three male negroes robbed at gunpoint a drugstore in Bartlesville, Oklahoma. Police gave chase to a yellow Oldsmobile which ran off the road approximately six miles north of Bartlesville, Oklahoma, and in an exchange of gunfire the four occupants of the Oldsmobile were seen fleeing into an adjacent wooded countryside. Two subjects were captured and the search for two others continued. The next day, June 17, 1975, the home of residents in the search area was burglarized with clothing and guns taken and an automobile stolen. From these events, Petitioner has been convicted by jury in the District Court of Washington County, Oklahoma, in the following three cases:

Petitioner was first convicted in CRF-75-383 of robbery with firearms, after former conviction of a felony, and sentenced to imprisonment for fifteen years. On direct appeal, Petitioner sought reversal of this conviction on the ground that it was error to introduce the commission of other crimes (burglary and larceny of an automobile) into the robbery trial. The Oklahoma Court of Criminal Appeals consolidated Petitioner's appeal with that of his co-defendant and found that there was error in admitting the evidence of other crimes and reversed the conviction of the co-defendant. The appellate court further held with regard to Petitioner before this court, "that the erroneous admission of the evidence of other crimes was harmless. The State's case against him [Petitioner] was overwhelming and we believe that the jury would have returned a verdict of guilty without

the improper evidence." Petitioner's conviction was affirmed. Burks v. State, Okl. Cr., ___ P.2d ___, 50 O.B.A.J. 133 (1979). In that decision, the Oklahoma Court of Criminal Appeals set forth procedures to be followed in all cases commenced after January 23, 1979, in which the State of Oklahoma intends to introduce evidence of crimes other than the one charged. Petition for rehearing was denied by order of the Oklahoma Court of Criminal Appeals filed May 15, 1979. Petitioner has filed no petition pursuant to the Oklahoma Post-conviction Procedure Act, 22 O.S.A. § 1080, et seq., in this Case No. CRF-75-383.

Petitioner was next convicted in CRF-75-387 of burglary in the second degree, after former conviction of a felony, and sentenced to imprisonment for fourteen years. On direct appeal, Petitioner sought reversal asserting two grounds of error, first, the admission as evidence of testimony from which the inference of Petitioner's involvement in or implication with other crimes or criminal acts could be drawn; and second, insufficient evidence to prove the essential elements of the crime and to support conviction. The Oklahoma Court of Criminal Appeals found there was only an implication of another crime which was obvious only to defense counsel and that the appeal contentions were without merit. The conviction was affirmed. Burks v. State, Okl. Cr., 568 P.2d 322 (1977).

Petitioner was thereafter convicted in CRF-75-384 of unauthorized use of a motor vehicle, after former conviction of a felony, and sentenced to imprisonment for nine years. On direct appeal, Petitioner sought reversal asserting error on two grounds: First, the admission into evidence of testimony of other crimes (the burglary in CRF-75-387, and that Petitioner was the subject of a search for suspects) from which the jury could infer that Petitioner had been involved in, or implicated with, other crimes; and second, the conviction, subsequent to the conviction of robbery in CRF-75-383 and burglary in CRF-75-387 was in violation of the constitutional guaranty against double jeopardy. The appellate court found the evidence of other crimes was admissible to show motive and intent, absence of mistake or accident,

identity, and a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one was necessary in order to establish the other. On the double jeopardy claim, the court found this claim had been waived in that the record is void of any showing that the matter had been presented to the trial court for consideration; and further, that the burglary and unauthorized use of the automobile located at the farm house were not identical offenses and that unauthorized use of a motor vehicle was not a necessary element of the burglary offense. The appellate court found no error that would require reversal or modification and affirmed the conviction. Burks v. State, Okl. Cr., 568 P.2d 1311 (1977).

In these latter two cases, CRF-75-384 and CRF-75-387, Petitioner filed an application for post-conviction review which was denied by the District Court in November, 1978. On appeal, the issues presented were (1) the conviction in CRF-75-384 and CRF-75-387, following the conviction in CRF-75-383, violated Petitioner's constitutional right against double jeopardy; and (2) ineffective assistance of counsel for failure to raise the double jeopardy issue at the trial level. The Oklahoma Court of Criminal Appeals, applying the test set forth in Brown v. Ohio, 432 U. S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), found burglary, unauthorized use, and robbery with firearms were not the same offenses and there was no double jeopardy. The denial of post-conviction relief was affirmed January 11, 1979, PC-78-689, and petition for writ of certiorari was denied by the Supreme Court of the United States on April 2, 1979.

In the § 2254 proceeding before this Court, "Response" has been filed and Respondents contend that Petitioner in his habeas corpus petition challenges as unconstitutional only his conviction in Case No. CRF-75-383. Further, Respondents contend that the only issue Petitioner presents is that he was denied a fair trial by the introduction of evidence of other crimes in his trial in CRF-75-383, and Respondents seek denial of the petition for failure to exhaust state remedies by application for post-conviction relief in CRF-75-383 in the state courts.

The "Response" is not in conformity with Rule 5 governing § 2254 cases, 28 U.S.C. foll. § 2254, and is of little assistance. If Petitioner seeks only habeas corpus relief in Case No. CRF-75-383, on the single issue contended by Respondents, dismissal for failure to exhaust state remedies is not absolute on the record before the Court. Although it is ordinarily true that the institution of a post-conviction action in the state court is a prerequisite to the granting of habeas relief even though petitioner may have unsuccessfully pursued a direct appeal, Brown v. Crouse, 395 F.2d 735 (Tenth Cir. 1968) and Omo v. Crouse, 395 F.2d 757 (Tenth Cir. 1968), an exception is made when there are no facts to be developed and the issue is purely one of law. Sandoval v. Rodriguez, 461 F.2d 1097 (Tenth Cir. 1972); Chavez v. Baker, 399 F.2d 943 (Tenth Cir. 1968).

Further, giving the § 2254 petition the liberal construction required of pro se proceedings, McKinney v. Taylor, 344 F.2d 854 (Tenth Cir. 1965); Chase v. Crisp, 523 F.2d 595 (Tenth Cir. 1975) cert. denied 424 U. S. 947 (1976), it appears that Petitioner as "Ground One" on page three of his petition contends that his convictions in Cases No. CRF-75-384 and No. CRF-75-387 were negated under the doctrine of double jeopardy by his earlier conviction in Case No. CRF-75-383. All three state convictions being judgments of a single state court, this double jeopardy issue may be raised herein pursuant to Rule 2(d), 28 U.S.C. foll. § 2254. On this double jeopardy contention, Petitioner's state remedies have been exhausted, as set out above, and the Oklahoma Court of Criminal Appeals stated in the post-conviction proceeding:

> In the first assignment of error, appellant contends that his conviction of Robbery with Firearms constitutes former jeopardy to the prosecution for Second Degree Burglary and Unauthorized Use. Appellant raised the same defense in Burks v. State, Okl. Cr., 568 P.2d 1311 (1977) asserting the burglary conviction was former jeopardy to a subsequent prosecution for unauthorized use. This Court applied the applicable test of that time and found that the offenses were not the same. The contemporary test to determine whether there are multiple offenses or only one is whether each statutory provision alleged to have been violated requires proof of an additional fact which the other does not. Bowen v. State, 49 O.B.A.J. 2040 (F-76-96, F-76-98, F-76-99, (1978); Brown v. Ohio, 432 U. S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Applying either the test followed in Burks v. State, Supra, or the contemporary test, we find that Burglary, Unauthorized Use and Robbery with Firearms are not the same offenses and that this assignment of error is without merit.

This Court upon review of the files and records is in agreement with the Oklahoma Court of Criminal Appeals. On the double jeopardy issue, the drugstore robbery was complete when the Petitioner departed the drugstore. The burglary was complete when Petitioner departed the house. The unauthorized use of the motor vehicle was committed thereafter. The latter two offenses were committed while Petitioner was attempting an escape from the drugstore robbery, and the unauthorized use of the motor vehicle was committed by use of the key taken in the burglary, however, that does not constitute one episode or a continuing or single crime requiring only one prosecution under the doctrine of double jeopardy. Not one of the three crimes is a lesser included offense of the other or precluded by collateral estopple, and the essential elements of each crime are separate and distinct from the others. There was no double jeopardy in the three separate trials under the circumstances before the Court and habeas corpus on this ground should be denied. See, Gavieres v. United States, 220 U. S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911); Blockburger v. United States, 284 U. S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Brown v. Ohio, Supra.

In regard to Petitioner's second issue, this Court also agrees with the Oklahoma Court of Criminal Appeals that the admission of the evidence of other crimes in Petitioner's conviction of robbery with firearms, Case No. CRF-75-383, was harmless error as to Petitioner. The drugstore owner, a customer, and a waitress each identified Petitioner as being inside the drugstore and an active participant, using a firearm, in the robbery. The owner's wife identified Petitioner as running past her in the alley from the drugstore just as the robbery was completed. Petitioner's trial counsel ably presented an alibi defense, although suspect and incredible, that Petitioner was in Wichita, Kansas, on the day of the robbery of the drugstore and that he was being confused with one of the robbery participants who looked like him and who had since the robbery in question been killed. The evidence presented of the house burglary and unauthorized use of an automobile culminating in Petitioner's arrest

in Coffeyville, Kansas, was found to be error, and the Oklahoma Court of Criminal Appeals stated:

> With regard to the defendant Burks, however, we hold that the erroneous admission of the evidence of other crimes was harmless. The State's case against him was overwhelming, and we believe that the jury would have returned a verdict of guilty without the improper evidence.

This Court in federal habeas corpus does not serve for an additional appeal of state cases. Sinclair v. Turner, 447 F.2d 1158 (Tenth Cir. 1971) cert. denied 405 U. S. 1048, 92 S.Ct. 1329, 31 L.Ed.2d 590, and trial errors such as the erroneous admission of evidence cannot afford a basis for collateral attack. Carrillo v. United States, 332 F.2d 202 (Tenth Cir. 1964); Alexander v. Daugherty, 286 F.2d 645 (Tenth Cir. 1961); Schechter v. Waters, 199 F.2d 319 (Tenth Cir. 1952); See also, Peterson v. Tinsley, 331 F.2d 569 (Tenth Cir. 1964). This is true unless the violation of the state evidentiary rule has resulted in the denial of fundamental fairness so as to violate due process. See, Woods v. Estelle, 547 F.2d 269 (Fifth Cir. 1977).

From this Court's examination of the relevant facts from the transcripts and files of the proceedings in the state courts, it appears that Petitioner's contentions were adequately litigated, that the state process gave him fair consideration of the issues and of the evidence, and the state courts made determinations which are supported by substantial evidence. This Court concludes that the state courts have applied correct standards of federal law to the facts in the case. Townsend v. Sain, 372 U. S. 293, 314-315, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) Thomas v. Field, 301 F.Supp. 904 (D.C. C.D.Calif. 1969); Hendrix v. Hand, 312 F.2d 147 (Tenth Cir. 1962). After a careful review of the records of the state proceedings, this Court concurs with the findings and decision of the Oklahoma Court of Criminal Appeals on the issues presented to this Court. Young v. State of Oklahoma, 428 F.Supp. 288 (D.C.W.D. Okla. 1976); Cassell v. People of State of Oklahoma, 373 F.Supp. 815 (D.C.E.D.Okla. 1973). This was not a circumstantial evidence case, rather, Petitioner's conviction was based on direct evidence of eyewitnesses. The record

supports that there was ample, substantial evidence from which the jury could have concluded that Petitioner was guilty beyond a reasonable doubt and this Court does not believe in the circumstances before it that the evidence of the other crimes contributed to Petitioner's robbery conviction, and believes the error in admitting the evidence of other crimes was harmless beyond a reasonable doubt. Chapman v. California, 386 U. S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). No evidentiary hearing is required and the petition for writ of habeas corpus should be denied.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Samuel Rayfael Burks be and it is hereby denied and the case is dismissed.

Dated this 26th day of September, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
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| BOBBY O. McCLENDON, Plaintiff, | ) | |
| vs. | ) | No. 79-C-441-D |
| ST. PAUL INSURANCE COMPANY, a foreign insurance company, Defendant. | ) | |



ORDER OF DISMISSAL WITH PREJUDICE

This case came on for consideration before this Honorable Court upon the Joint Application And Stipulation of the parties for a voluntary dismissal of the above styled and entitled action, with prejudice, and the Court being fully advised in the premises finds that said Application and Stipulation For Dismissal should be, and is hereby, approved.

IT IS THEREFORE ORDERED by the Court that the above styled and entitled action, and each of the claims and causes of action of the Plaintiff, be and the same are hereby dismissed with prejudice to the filing of a future action, and that each of the parties hereto bear their own costs incurred herein.

DATED this 26 day of September, 1979.

Frederick Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| WESTERN STAR ENTERPRISES, INC., Plaintiff, | ) | |
| v. | ) | No. 78-C-498-C |
| BORG-WARNER ACCEPTANCE CORPORATION, Defendant. | ) | |



STIPULATION OF DISMISSAL

COME NOW the plaintiff and defendant, by their respective attorneys of record, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure stipulate that the above-entitled cause is dismissed with prejudice at the costs of plaintiff.

WESTERN STAR ENTERPRISES, INC.

By /s/ Thomas G. Marsh

Thomas G. Marsh
525 South Main, Suite 210
Tulsa, Oklahoma 74103
Telephone (918) 587-0141
ATTORNEY FOR PLAINTIFF

BORG-WARNER ACCEPTANCE CORPORATION

By /s/ Dallas E. Ferguson

Dallas E. Ferguson
1200 Atlas Life Building
Tulsa, Oklahoma 74103
Telephone (918) 582-1211
ATTORNEY FOR DEFENDANT

FILED

SEP 26 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CIVIL ACTION NO. 79-C-498-C |
| CHARLES O. PEARSON, a Single Person, and FLOYD LOUSER d/b/a TULSA AUTO SALES, Defendants. | ) | |

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 26th day of September, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 26th day of September, 1979.

Assistant United States Attorney

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 78-C-263

Khoda-Doost Kazemi and
Sekineh Sarshoghi Kazemi,

Plaintiffs,

vs.

**JUDGMENT**

Robert Edward Shay and
North American Moving and
Storage Company,

Defendants.

This action came on for trial before the Court and a jury, Honorable Clarence A. Brimmer, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendants.

It is Ordered and Adjudged that the Plaintiffs take nothing and that the Defendants recover of the Plaintiffs their costs of action.

FILED
SEP 25 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 25th day of September, 1979.

HONORABLE CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

Clerk of Court
JACK C. SILVER

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| ALONZO L. PHILLIPS, Plaintiff, | ) | |
| v. | ) | No. 78-C-559-C |
| JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, Defendant. | ) | |



JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the Briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying him the continued disability benefits and supplemental security income benefits provided for in Sections 216, and 1614(a) of the Social Security Act, as amended. 42 U.S.C. §§416, 423 and 1382(c). He asks that the Court reverse this decision and award him the additional benefits he seeks.

This matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued August 23, 1978. The Administrative Law Judge found that plaintiff was not entitled to continued disability benefits or supplemental security income benefits under the Social Security Act, as amended, after January, 1977, because he regained the residual functional capacity to perform the light and sedentary jobs discussed at the hearing by the vocational expert. Thereafter, that decision was appealed

to the Appeals Council of the Bureau of Hearings and Appeals, which Council on September 13, 1978, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education, and Welfare from which Plaintiff has brought this action for judicial review.

Plaintiff contends that the Secretary's decision that after January 1977 he was not totally disabled is incorrect. Plaintiff maintains that he proved he was still disabled after January 1977. Plaintiff's claimed disability is attributable to problems with his back.

In his brief Plaintiff questions the Administrative Law Judge's reliance on the testimony of the Vocational Expert, V. Clinton Purtell, who testified at the hearing. In particular, the plaintiff questions the qualifications of Mr. Purtell. Plaintiff argues that Mr. Purtell has no medical training or expertise that would permit him to make a judgment as to claimant's ability to do certain work and perform certain functions and that Mr. Purtell's testimony is contrary to the opinions of medical experts whose reports are contained in the transcript. Mr. Purtell's "Resume of Experience and Background", (Tr. 121-122) shows among other things that Mr. Purtell has been a "Vocational Rehabilitation Counselor" since June of 1968 with Rehabilitative Services, DISRS, State of Oklahoma. His duties include "Daily vocational evaluation, guidance and job placement of adult handicapped."

Mr. Purtell testified at the hearing that he had been present during the hearing and heard the testimony of the claimant; that he was familiar with the past work that

claimant had performed; that assuming claimant could not return to his former work; assuming that claimant has a limitation from a back condition; assuming that claimant would be able to sit or stand intermittently and do either light or sendendary work; that on the basis of such assumptions claimant had "transferrable skills" so as to be qualified for certain jobs which are available in the region as follows:

> "Stationary engineer for a hospital, city, school or state institution. Housekeeping work for a large hospital, school or large office building. Supervise a hospital department in a hospital, a state institution. The department such as housekeeping, laundry, etc. Supervise a custodial crew in a similar setting. Salesman for a pipe fitting and plumbing supply company. Salesman for hospital and medical supplies. Salesman for custodial chemical supplies and do bench assembly work for an electronics manufacturing firm. Do soddering work in an electronic assembly plant. Guard or patrolman for a security company -- private security company. A factor rep for a welding supply manufacturing company. A city plumbing inspector. Work or supervise at an appliance repair place such as (UNTELLIGIBLE). Welding and equipment supply store clerk. Those are the ones I would mention, Your Honor." Tr. 32-33)

There is no dispute about plaintiff's disability from August 1974 to January 1977. He apparently injured his back at work in 1973 and underwent surgery in August 1973, March 1974, and July 1976. X-rays taken after the last surgery indicated that the fusion was stable and healing satisfactorily. (Tr. 113) Plaintiff's treating physician, Dr. Modrak, submitted follow-up reports on plaintiff's recuperation from the July 1976 surgery. Dr. Modrak's report of September 24, 1976 states that plaintiff "had been freed of his pre-operative lumbar pain," and "was instructed to increase his activities as tolerance permitted." (Tr. 104) In November 1976, Dr. Modrak reported that X-rays revealed plaintiff's "spinal fusion was consolidating very well;"

that plaintiff "was symptomatically greatly improved;" and that plaintiff should "continue increasing his activities as tolerance permitted." (Tr. 105) In December 1976, Dr. Modrak submitted a report summarizing the history of plaintiff's back problems and the treatment he received for them. Dr. Modrak stated that plaintiff's surgery had been successful and that he was "symptomatically greatly improved." (Tr. 106-108) Plaintiff saw Dr. Modrak again in January 1977, and repeat X-rays revealed a solid spinal fusion. The report shows that Plaintiff complained about a popping sound when he moved in certain directions, which the doctor explained and reassured plaintiff and instructed him to "increase his activities." (Tr. 109)

In a "Recorded Telephone Contact" between Dr. Modrak and Dr. Brundage of May 23, 1977, (Tr. 110), Dr. Modrak stated that at that time it was his diagnosis that Plaintiff "will have permanent disability in the nature of continued pain in the back and lower extremity and that he will be permanently disabled for this. He will not be able to return to his former occupation." A report of A. C. Billings, M. D. of November 9, 1977, (Tr. 112), states that a lumbar myelogram was carried out on plaintiff on November 7, 1977 which revealed "mild spondylosis and epidural scarring"; that the cervical region "did not appear to have an abnormality at C5-6 which was the pathological level under suspect clinically;" that in the lumbar area "there was moderate deformity of the back from L3 inferiorly representing epidural scarring and arachnoidal adhesions;" that "No definite disc herniation or nerve route compression could be identified;" and that the patient was discharged and was to continue taking his elavil and prolixin. In his report of November 21, 1977 Dr. Billings states that plaintiff has 35

percent physical impairment to the whole body and that no further surgery is recommended. Dr. Billings also states that plaintiff "is not capable of performing ordinary manual labor". (Tr. 116-117).

The conclusions of Dr. Modrak that plaintiff would not be able to return to his former occupation and of Dr. Billings that plaintiff is not capable of performing ordinary manual labor are not sufficient to show that plaintiff is unable to engage in any substantial gainful activity by doing light and sedentary work within plaintiff's vocational capabilities.

The administrative record indicates that plaintiff was only fifty-two years old in January 1977, when the Secretary found plaintiff had regained the capacity for light and sedentary work. He has a high school diploma and has taken a few college business courses. Plaintiff worked as a maintenance engineer at St. Francis Hospital for fourteen years, and did similar work for a chemical company before that. Plaintiff also did construction work as a pipefitter after getting out of the Navy in 1945. (Tr. 26-27).

The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969). In this case, the burden was on plaintiff to prove that his disability continued past the January 1977 cessation date found by the Secretary. Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972).

The medical reports indicate that plaintiff may still have a back problem, but after he recuperated from his successful surgery, it was no longer severe enough to prevent his doing light to sedentary work. Rhynes v. Califano, 586 F.2d 388 (5th Cir. 1978). The Secretary's decision indicates that he gave careful consideration to plaintiff's subjective complaints of pain, and resolved the issue against plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965).

Because the Social Securtiy Act requires an inability to engage in any substantial gainful activity, it is not enough to show that plaintiff's back condition may prevent his performing the heavy lifting associated with his prior work as a maintenance engineer. Keller v. Mathews, 543 F.2d 624 (8th Cir. 1976); Waters v. Gardner, 452 F.2d 855 (9th Cir. 1971). As attested to by the voational expert, many light and sedentary jobs exist that are within plaintiff's vocational capabilities. Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberrry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze,

351, F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such

findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 25th day of September, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
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| CNA/INSURANCE COMPANY, an Illinois corporation, | ) | FILED |
| Plaintiff, | ) | SEP 28 1979 |
| v. | ) | Jack C. Silver, Clerk U. S. DISTRICT COURT |
| GLACIER GENERAL ASSURANCE COMPANY, a Montana corporation, | ) | |
| Defendant. | ) | No. 78 C 500 C |

ORDER

This cause coming for hearing this 24th day of September, 1979 on the Motion to Dismiss of the defendant, Glacier General Assurance Company, William F. Smith appearing for the plaintiff, and G. David Davis and Claire Eagan Barret appearing for the defendant, and oral argument having been presented by both sides on the Motion to Dismiss, the Court finds for the defendant, Glacier General Assurance Company.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant, Glacier General Assurance Company, be and the same is hereby sustained and the Complaint filed herein by the plaintiff, CNA/Insurance Company, against Glacier General Assurance Company be and the same is hereby dismissed. Costs are awarded in favor of the defendant.

ENTERED this 25th day of September, 1979.

(Signed) H. Dale Cook

H. DALE COOK
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MILDRED P. (BARBARA) BISHOP,

Plaintiff,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, R. MICHAEL DUNCAN, AND HOWARD B. BULLARD, III, Individually and as EXECUTORS OF THE ESTATE OF EDGAR F. BULLARD, Deceased, HOWARD BULLARD, DORIS DUNCAN, JACK C. DUNCAN and BRECK G. DUNCAN,

Defendants.

78-C-433-C



ORDER

Under the plaintiff's latest theories espoused in her briefs and at oral argument, her contentions emit an aura of concepts embraced in recent cases of some notoriety between non-marital parties involving enforcement of alleged contracts and constructive trusts, based on the gravamen of fraud.

The basis of all the claims asserted by plaintiff have a common foundation in an alleged relationship that she entered into with Edgar F. Bullard, now deceased.

The Court finds itself "wandering through a maze" of allegations, contentions, arguments, and as counsel for defendants commented at the hearing, "phantom complaints" connoting to this litigation a perpetual, illusive chronicle of happenings and events that form the predicate of the present controversy. In this connection, although asserting various arguments concerning her legal positions, plaintiff has not seen fit to amend her complaint, and in view of the pending motions, the allegations of the complaint are controlling.

In order that a focal point be established, without belaboring the precise legal relationship alleged between the plaintiff and the deceased, the narrative of this litigation will commence at a

point in time, after the death of Mr. Bullard, when plaintiff first asserted her claims in a tribunal for disposition.

In March and April of 1978, plaintiff filed Creditor's Claims in the estate proceedings pending in Tulsa County, Oklahoma, concerning the deceased. The Executors of the Estate rejected these claims.

On April 28, 1978, plaintiff commenced legal action against the above named defendants in the United States District Court for the Western District of Tennessee. While the case was pending in Tennessee, the defendants filed a Motion to Dismiss the entire complaint or an alternative Motion to Dismiss Certain Counts and Certain Defendants. While said Motion was pending, the plaintiff filed a Motion to Transfer the case to this Court. Said Motion was granted as to the transfer. The precise order of the Tennessee Court and its effect will be hereinafter discussed.

Upon arrival of the case in this District, the plaintiff filed a Notice of Dismissal, pursuant to Rule 41(a), F.R.Civ.P., as to the defendants, Howard Bullard, Doris Duncan, Jack C. Duncan and Breck G. Duncan, in their individual capacities only. Thereafter, a Stipulation was entered into between counsel for the plaintiff and defendants whereby The First National Bank and Trust Company of Tulsa, R. Michael Duncan and Howard B. Bullard, III, in their individual capacities, were dismissed without prejudice.

The sole remaining defendants, The First National Bank and Trust Company of Tulsa, R. Michael Duncan and Howard B. Bullard, III, as co-executors of the Estate of Edgar F. Bullard, deceased, filed a Motion to Strike and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (the motions presently pending before this Court as well as that portion of the Motion to Dismiss filed in Tennessee, not ruled on by that Court).

This Court must travel back to Tennessee in time to review the "happenings" in order to place parties in a perspective for dispositive ruling on the pending motions.

The Motion to Dismiss the Entire Complaint, or in the Alternative to Dismiss Certain Counts and Certain Defendants, raised the following grounds:

> 1. To dismiss this action because The First National Bank and Trust Company of Tulsa, Oklahoma, a co-executor, may not be sued in the United States District Court for the Western District of Tennessee by reason of improper venue and as this defendant is an indispensable party to the action, the entire action must fail.
>
> 2. In the alternative, to dismiss the action insofar as it attempts to state claims for relief under Counts II, III and IV of the Complaint for failure to meet the requirements of the Tennessee Long Arm Statute.
>
> 3. To dismiss the action to the extent that it attempts to include the heirs of the estate of Edgar F. Bullard as proper parties against whom any relief can be granted.

To reiterate, while these motions were pending, the plaintiff filed a Motion to Transfer this case to this Court pursuant to 28 U.S.C. §1406(a). In the brief in support of said motion, plaintiff stated:

> Although the issue relating to land situated in Tennessee may be considered as local, the Plaintiff's case has many elements which make it transitory in nature. Plaintiff is not seeking to impress a trust upon lands in Tennessee or seeking performance, but the action is more in the nature of a breach of contract relating to real estate in Tennessee which takes on aspects of both a local and transitory action.

Plaintiff then conceded that pursuant to 12 U.S.C. §94, venue was improper as to The First National Bank and Trust Company. In her brief plaintiff further stated:

> ....[W]e say this becuase(sic) of the Oklahoma law which dictates actions to be brought within a specified time frame or be barred, said time having expired.... (Emphasis supplied)

In the conclusion to said brief, plaintiff stated:

> Since the Oklahoma law requires an action to be commenced within a stated time after rejection of claims against an estate, and that time has expired, the court in the interest of justice should transfer this action to the Northern District of Oklahoma....(Emphasis supplied)

In a supplemental brief submitted by the plaintiff on the transfer motion in Tennessee, it is once again asserted that "limitations had run for the filing of the action in Oklahoma."

The Tennessee Court thereafter, undoubtedly swayed by plaintiff's arguments and assertions concerning the limitation problem, entered an Order Granting the Motion to Transfer and Denying the Motion to Dismiss the Entire Complaint, reserving to the transferee Court the balance of the pending Motions, by stating:

> Without ruling on the merits of the other grounds of the Motion to Dismiss, the Court declines to rule on those grounds of the Motion to Dismiss. Further disposition is reserved for the transferee Court to the extent that the grounds are not moot by virtue of the transfer.

Ab initio, the Court is faced with a question raised by the remaining defendants, in their Motion to Dismiss, i.e., the question of subject matter jurisdiction.

It is apparent the transferor Court did not decide the question of personal jurisdiction raised by the defendants, but reserved that decision to the transferee Court. It was established in Goldlawr v. Heiman, 369 U.S. 436, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962) that the power of a district court to transfer a case under §1406(a) does not depend upon personal jurisdiction over the defendants. Moore' Federal Practice, Vol. 1, ¶0.145[4.-5]. The language in Mr. Justice Black's opinion is quite clear to the effect that the power of the district court to transfer a case under §1406(a) extends to all cases in which the venue is improper "however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not".

A Court may not, however, order a transfer under §1406(a) unless the Court has jurisdiction of the subject matter of the action. Wright & Miller, Federal Practice and Procedure, Vol. 15, §3827.

Subject matter jurisdiction is defined in 20 Am.Jur.2d, Courts, §105 as follows:

> ...."[J]urisdiction over the subject matter" has been variously defined as referring to the nature of the cause of action and of the relief sought, the class of cases to which the particular one belongs and the nature of the cause of action and of the relief sought, the power of a court to hear and determine cases of the general class to which the particular one belongs, and to both the classes of cases and particular subject matter involved.

This Court, therefore, finds that in order for the Tennessee Court to transfer the instant litigation, it must have had subject matter jurisdiction. Atlantic Ship Rigging Co., Inc. v. McLellan, 288 F.2d 589 (3rd Cir. 1961); Raese v. Kelly, 59 F.R.D. 612 (UADC ND W.Va. 1973); James v. Daley & Lewis, 406 F.Supp. 645 (USDC Del. 1976); Calzaturifico Giuseppe v. Darmouth Outdoor Sports, 435 F.Supp. 1209, f. 6, p. 1211 (USDC SD NY 1977); 3 ALR Fed., §14, p. 496.

The Complaint, originally filed in the United States District Court in Tennessee, can be summarized as follows:

> Count I sets up a claim based upon the representations of the decedent that plaintiff change her position, and seeks judgment in the sum of $132,526.61 by reason "of the refusal, after demand, of said executors to complete and deliver the property [condominium] to plaintiff." The figure of $132,526.61 also includes moving expenses paid by plaintiff and alleged to be the obligation of the decedent.
>
> Count II sets up the claim for the trust and seeks damages from the estate of decedent in the sum of $1,668,000.00. In this Court plaintiff asserts that the "decedent established or would have established a trust for her benefit, but upon his death no trust was found..."
>
> Count III sets up the claim concerning the working interest in leases in Texas. Plaintiff seeks 1/2 interest in said leases (1/2 interest having previously been conveyed to her by the decedent) and that the oil runs be accumulated to her benefit. She also seeks reimbursement of $2,747.82 paid by her for operating expenses on the 1/2 interest she owns and an order directing the payment of the operating expenses. In the alternative, she seeks judgment in the sum of $500,000---the estimated value of the 1/2 interest she seeks to recover.
>
> Count IV sets up the claim for the mink coat she purchased at the alleged direction of the decedent. She seeks $5,500.00.

The Court notes that all of these items, in one form or another, were presented to the executors in the probate proceedings in Tulsa County, Oklahoma, and rejected.

Prior to October 1, 1976, Title 58 O.S.1961 §339, provided:

> When a claim is rejected, either by the executor or administrator, or the judge of the county court, the holder must bring suit in the proper court, according to its amount against the executor or administrator, within three months after the date of its rejection, if it be then due, or within two months after it became due, otherwise the claim is forever barred. (Emphasis supplied)

Effective October 1, 1976, Title 58 O.S.Supp.1978, §339, provides:

> When a claim is rejected by the executor or administrator, or the judge of the district court, the holder may bring an ancillary proceeding in the probate case or an independent action, according to its amount, against the executor or administrator. Any proceeding or action shall be filed within forty-five (45) days after the date the claim was rejected, if it be then due, or within two (2) months after it became due; otherwise the claim is forever barred.... (Emphasis supplied)

This Court is faced with the juxtaposition of a plaintiff in a unique jurisdictional quandry. In the first instance, plaintiff asserted her claims against the estate of Mr. Bullard, and was unsuccessful--the executors rejected her claims. She thereafter instituted litigation in the Federal Court in Tennessee. When faced with the possible dismissal of the action, plaintiff argued successfully to the Court that the applicable Statute of Limitations had run and requested transfer. The Court in Tennessee acceded to this request. The case is now in this Court, and this Court is faced with the problem of subject matter jurisdiction when the case was transferred, in view of the Oklahoma Statutes which reflect the strong interest of the State of Oklahoma in matters of probate affecting its citizens.

This Court is aware that the Supreme Court of the State of Oklahoma has not yet been called upon to interpret the new §339. The latest case is State Ex Rel Otjen v. Mayhue, 476 P.2d 317, 318, 319 (Okl. 1970), wherein the Court said that an "[A]ction upon a rejected claim to establish money demand against the estate must be brought in the county of probate." At page 322 the Court said:

> ....[T]itle to testator's property was in petitioner by virtue of appointment by the probate court having jurisdiction of the probate estate. Actions for recovery of property, title or right to which was represented by petitioner, affected property of decedent and venue of such action properly was against the executor in his official capacity in the county where appointed and qualified.

In 31 Am.Jur.2d §737, Executors and Administrators, it is stated:

> The proper venue of actions against personal representatives in their official capacity has been deemed to be in the county of administration under the applicable statutes specifically to that effect, despite the contention that venue was controlled by a general venue statute....

In Farnsworth v. Hubbard, 277 P.2d 252, 256 (Ariz. 1965) the Court said:

> ....[T]he rights and duties of an administrator are defined by the jurisdiction in which he receives his appointment. For other courts to regulate his actions would create confusion and possibly inconsistent duties. The refusal of most courts to grant jurisdiction to sue a foreign administrator and their requirement that such administrator be sued in the jurisdiction giving him his authority appears to be a sound practice with which we are in accord.
>
> ....[T]he exception, generally recognized, is that when a foreign administrator controls assets of the deceased in a court's jurisdiction, then suit will be permitted.

See also State of New Mexico ex rel. Burk F. Scott, Jr., etc. v. Zinn, 392 P.2d 417 (New Mex. 1964).

The record before this Court is completely devoid of any evidence that could be construed to the effect that assets of the decedent's estate are present in the State of Tennessee.

This Court is of the opinion that if the Oklahoma Supreme Court were faced with the interpretation of §339, as applicable to the facts and circumstances in this case, it would opine that such statute, inherently, would require actions against the executors of testates to be commenced within the time limits prescribed therein to be instituted in a proper Court within the County and/or District where the probate proceedings were pending.

The complaint filed by plaintiff in the instant litigation seeks money judgments against the estate of the decedent. Plaintiff originally submitted claims and they were rejected. She thereafter instituted the action in Tennessee. She argued to that Court

that the applicable statute of limitations had run in a successful effort to gain a transfer to this District rather than a dismissal.

This Court finds that the action instituted by the plaintiff in Tennessee did not vest that Court with subject matter jurisdiction to transfer the action, nor did it toll the applicable statute of limitations contained in §399.

The Court, therefore, finds that since this case was improperly transferred, the defendants' Motion to Dismiss as it relates to this theory for dismissal should be sustained [thus rendering the other motions proposed by defendants moot].

IT IS, THEREFORE, ORDERED that the Motion to Dismiss of the defendants as it relates to their theory of dismissal [lack of subject matter jurisdiction on transfer] should be sustained, and in the interests of judicial economy, rather than retransfer back to Tennessee for consideration by that Court of dismissal, the Court will dismiss the causes of action and complaint.

ENTERED this 25th day of September, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

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| CACTUS FEEDERS, INC., a Texas corporation, Plaintiff, | ) | |
| v. | ) | No. 78-C-482-C |
| MARK FREEMAN, III, Defendant. | ) | |

ORDER OF DISMISSAL

COMES NOW the Court and dismisses with prejudice the above captioned matter incorporating herein the Application for Dismissal and Stipulation.

Dated this 24th day of September, 1979.

s/ Clarence A. Brimmer
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF OKLAHOMA

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| PENNWALT CORPORATION, a corporation,<br><br>Plaintiff,<br><br>v.<br><br>TULOMA STEVEDORING, INC., a corporation, and OKLAHOMA-KANSAS GRAIN CORP., a corporation,<br><br>Defendants and Third-Party Plaintiffs,<br><br>v.<br><br>UNION MECHLING CORPORATION, a corporation,<br><br>Third-Party Defendant. | FILED<br><br>SEP 24 1979<br><br>Jack C. Silver, Clerk<br>U. S. DISTRICT COURT<br><br>NO. 77-C-191-C |

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 24th day of September, 1979, the above style and numbered cause of action comes on for settlement and dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure. The parties were represented by their respective counsel.

The Court has reviewed the Settlement Agreement and Joint Application for Order of Dismissal With Prejudice and finds as follows:

That the parties and each of them have agreed to dismiss with prejudice their respective claims as alleged in plaintiff's complaint against Tuloma Stevedoring, Inc. and Oklahoma-Kansas Grain Corporation, defendants and third-party plaintiffs and third-party plaintiffs' complaint against Union Mechling Corporation, third-party defendant, and any and all claims, actions, or causes of action that have arisen or may arise as a result of such claims, or actions in connection therewith;

That each of the parties have agreed to bear their own costs and expenses, including attorneys' fees.

That each of the parties is desirous of dismissing their respective claims with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Settlement Agreement of the parties be and the same is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint against the defendants and each of them and the third-party complaint of the defendants and third-party plaintiffs against Union Mechling Corporation, third-party defendant, be and the same are hereby dismissed with prejudice to future filing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties bear their own costs and expenses, including attorneys' fees.

Dated this 24th day of September, 1979.

H. Dale Cook, Chief Judge
United States District Court
Northern District of Oklahoma

APPROVED AS TO FORM:

PENNWALT CORPORATION

By _____
Attorneys for Plaintiff

TULOMA STEVEDORING, INC.

By _____
Attorneys for Tuloma Stevedoring, Inc.

OKLAHOMA-KANSAS GRAIN CORPORATION

By _____
Attorneys for Oklahoma-Kansas Grain Corporation

UNION MECHLING CORPORATION

By _____
Attorneys for Union Mechling Corporation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 24 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

GLENDA J. SUTTON,

Petitioner,

-vs-

No. 79-C-152-D

THE DEPARTMENT OF ENERGY AND JOHN H. MELVIN, SPECIAL INVESTIGATOR, and OFFICER OF THE DEPARTMENT OF ENERGY,

Respondents.

ORDER OF DISMISSAL

This matter comes on for hearing this 24th day of September, 1979, before the undersigned Federal Judge of the United States District Court for the Northern District of Oklahoma, upon the Motion to Dismiss of the petitioner, Glenda J. Sutton.

For good cause shown, and for the additional purpose that the cause of action is now moot, the Court finds that said dismissal should be granted.

IT IS THEREFORE ORDERED, AND ADJUDGED that the dismissal of the petitioner, Glenda J. Sutton, should be sustained and the cause of action dismissed without prejudice.

FRED DAUGHERTY
JUDGE OF THE U.S. DISTRICT COURT

APPROVED AS TO FORM:

Don E. Gasaway, Attorney for Petitioner

Robert P. Santee, Assistant United States Attorney

MEA/jm

9/21/79

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ROSEMARY M. SPRADLEY,

Plaintiff,

vs.

SKAGGS DRUG CENTERS, INC. and ALBERTSON'S, INC.,

Defendants.

No. 77-C-118-C

FILED

SEP 24 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

On the 10th day of September, 1979, pursuant to regular setting, the above captioned case came on for trial, plaintiff having announced ready, defendants having announced ready, the jury was duly empanelled, and having heard the evidence presented by the parties, the argument of counsel and the instructions of the Court, found as follows on September 12, 1979:

"We, the Jury, find against the plaintiff on plaintiff's First Cause of Action and in behalf of the defendants.

s/Vernon W. Pinkey, Foreman"

"We, the Jury, find against the plaintiff on plaintiff's Second Cause of Action and in behalf of the defendants.

s/Vernon W. Pinkey, Foreman"

"We, the Jury, find against the defendants on defendants' counterclaim and in behalf of the plaintiff.

s/Vernon W. Pinkey, Foreman"

The jury was polled, the verdict received and thereupon the plaintiff moved that the Court, in view of the jury verdict, require the defendants to "remove all derogatory information from the employment records of the plaintiff pertaining to the incident occurring December 17, 1975 (sic)" which motion was overruled by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the verdict of the jury shall become the judgment of this Court and the Clerk is instructed to file this judgment on the judgment docket instanter.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| BOB WILSON,<br><br>Plaintiff,<br><br>vs.<br><br>LEE JEFFERY, Individually and in his official capacity as Superintendent of Wyandotte Public Schools, Wyandotte, Oklahoma; ROBERT KRUSE, LARRY DAVIS, ELLEN MONROE, LOUISE EASLEY and RALPH HIGHFILL, Individually and in their official capacity as members of the Board of Education of Independent School District No. 1, Wyandotte, Oklahoma; and INDEPENDENT SCHOOL DISTRICT NO. 1 OF WYANDOTTE, OTTAWA COUNTY, OKLAHOMA,<br><br>Defendants. | ) | No. 78-C-275-C |



O R D E R

The Court now considers the Motions for Summary Judgment of plaintiff and defendants. This is an action for alleged wrongful termination of employment in violation of Title 42 U.S.C. §1983, and alternatively for enforcement of state statutes and contract under diversity jurisdiction. The issues for this Court's determination are 1) the requirements of plaintiff's contract with defendant school board with respect to his administrative duties and the termination thereof, 2) the requirements of state law with respect to plaintiff's termination as an administrator, and 3) whether plaintiff's function as a teacher and an administrator are severable for the purposes of this action, as defendant argues they are, or whether those duties are non-severable under the heading of "teacher-administrator", as is argued by plaintiff.

Plaintiff terms his job as that of "teacher-administrator" and claims that the contract, statutes, and administrative

rules invoked in this action are applicable to that dual function. A careful reading of those items mandates a contrary conclusion. The pertinent statute is Title 70, Okla. Stat. Annot. §§6-101 et seq., and it deals exclusively with teachers, offering nothing as to the relationship between administrators and the school board. §6.103.1(B) states:

> The dismissal, suspension and nonreemployment procedures of this act shall apply to administrators only insofar as they have qualified as tenured teachers, and none of the provisions of this act shall grant tenure to an administrator acting in the capacity of an administrator.

Moreover, the act makes no mention of "teacher-administrators", and it is therefore plain that the only rights plaintiff may enforce in this Court under §§6-101 et seq. are those of a teacher. As to that issue, the Court finds that none of plaintiff's rights as a teacher were denied under this statute.

Plaintiff relies on §6-101(E), which provides:

> A board of education shall have authority to enter into written contracts with teachers for the ensuing fiscal year prior to the beginning of such year. If, prior to April 10, a board of education has not entered into a written contract with a regularly employed teacher or notified him in writing by registered or certified mail that he will not be employed for the ensuing fiscal year, and if, by April 25, such teacher has not notified the board of education in writing by registered or certified mail that he does not desire to be reemployed in such school district for the ensuing year, such teacher shall be considered as employed on a continuing contract basis and on the same salary schedule used for other teachers in the school district for the ensuing fiscal year, and such employment and continuing contract shall be binding on the teacher and on the school district. Provided that no district or any member of the board of education of a district shall be liable for the payment of compensation to a teacher under the provisions of the teacher's contract for the ensuing year, if it becomes necessary to close the school because of insufficient attendance, disorganization, annexation, consolidation, or by dispensing with the school according to law, provided, such cause is known or action is taken prior to July 1, of such ensuing year.

On March 6, 1978, defendants considered plaintiff's contract,

and voted to offer him one for the following year (that offer being the subject of this litigation) for teaching duties only. As evidenced by the fact that he is still teaching at defendants' school, plaintiff accepted that contract, but the record is unclear as to when he accepted it. If he accepted it before April 10, 1978, then §6-101(E) was satisfied. If by April 25, 1978, plaintiff had not notified defendants of any intention of his not to continue as a teacher, then he was bound under a continuing contract to teach in the school district, but the terms of that continuing contract are not a repetition of plaintiff's contract for the previous year, as plaintiff assumes. Rather, the terms as to compensation are ". . . the same salary schedule used for other teachers in the school district for the ensuing fiscal year". Nothing in §6-101(E) mandates the continuation of plaintiff's administrative assignments under the old contract. Plaintiff argues in effect that the continuing contract provision is a continuation of the old contract and all its terms; it is not. Rather, it is instead a continuation of the contractual relationship as to teaching, with the terms being those of other teachers in that district for that year. Thus, there is nothing out of order in this case under the provisions of §§6-101 et seq.

Similarly, there is nothing in plaintiff's contract to afford the relief he seeks in this action. That document refers to administrators in the following manner:

> Four (sic) such services, which shall consist of basic teaching duties, administrative duties such as are assigned, and additional duties, such as may be assigned, the Board agrees to pay to teacher as salary pursuant to this employment agreement the sum of $16,100 to be paid in twelve (12) equal monthly installments, commencing on the 15th day of August, 1977. Your employment calculation is as follows:
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> | | | |
> |---|---|---|
> | $9,115.00 - Base | $ 900.00 | - Masters |
> | $2,300.00 - Increments | $ 900.00 | - 77 increase |
> | | $ 2,885.00 | - Adm. |
> | Total Salary | $ 16,100.00 | |

¶3, Plaintiff-Defendant Contract, Exhibit A attached to Complaint. No further reference is made to administrators or to administrative duties. ¶¶10, 11, and 13 of plaintiff's contract incorporate provisions of §§6-101 et seq., specifically §6-101(D) (mistakenly referred to as §6-101(E)), §6-101(E)(referred to as Section 80-e, School Laws of Oklahoma, 1971), and again §6-101(D)(correctly cited). As discussed above, those provisions were fully complied with by defendants.

Thus the law presented to this Court fails to illustrate plaintiff's property interest in his job as an administrator, and without such interest, this action must fail. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971). It necessarily follows that defendants had no duty to notify plaintiff of termination. He was not terminated as to his teaching duties, and plaintiff has offered no rules or promises incumbent on defendant in the termination of plaintiff's administrative duties. It also follows that plaintiff was not entitled to a statement of charges or a hearing.

For the foregoing reasons, it is hereby Ordered that defendants' Motion for Summary Judgment be sustained, and further that plaintiff's Motion for Summary Judgment be overruled.

It is so Ordered this 24th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| ROBERT E. SNIDER, Defendant. | ) | CIVIL NO. 79-C-472-C |

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Robert E. Snider, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Robert E. Snider, was personally served with Summons and Complaint on July 26, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Robert E. Snider, for the sum of $1,940.93 as of June 4, 1979, plus interest from and after said date and the costs of this action accrued and accruing.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| KATHY G. MANES, Defendant. | ) | CIVIL NO. 79-C-518-C |

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Kathy G. Manes, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Kathy G. Manes, was personally served with Summons and Complaint on August 18, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Kathy G. Manes, for the sum of $2,078.75 as of August 5, 1979, plus interest from and after said date and the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



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| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| MARGARET A. STILL, Defendant. | ) | CIVIL NO. 79-C-520-C |

DEFAULT JUDGMENT

This matter comes on for consideration this 24th day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Margaret A. Still, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Margaret A. Still, was personally served with Summons and Complaint on August 20, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Margaret A. Still, for the sum of $622.13 as of August 5, 1979, plus interest from and after said date and the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| EDWARD J. BYFORD,<br><br>Plaintiff,<br><br>v.<br><br>JOSEPH A. CALIFANO, JR.,<br>Secretary of Health,<br>Education and Welfare,<br><br>Defendants. | ) | No. 78-C-569-C |



JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education and Welfare denying him the disability benefits and supplemental security income benefits provided for in Sections 216 and 1614(a) of the Social Security Act, as amended. 42 U.S.C. §§416, 423, and 1382(c). He asks that the Court reverse this decision and award him the benefits he seeks.

This matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued June 19, 1978. The Administrative Law Judge found that plaintiff was not entitled to disability benefits or supplemental security income benefits under the Social Security Act, as amended, because on or before September 30, 1976, when plaintiff's insured status expired, he retained the residual functional capacity to perform his usual work activity as owner and operator of a used car lot. There-

after, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on November 8, 1978 issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education, and Welfare from which plaintiff has brought this action for judicial review.

Following the hearing before the Administrative Law Judge on May 10, 1978 and on the same date that the Administrative Law Judge entered his decision denying benefits, claimant employed an attorney, Reo E. Nicar, to represent him in connection with his request for review by the Appeals Council. Claimant submitted and the Appeals Council considered additional evidence not presented to the Administrative Law Judge at the time of the hearing including a medical report dated November 21, 1972 of David O. Marifield, M. D. and a letter dated August 17, 1978 from L. M. Haymon, claimant's tax accountant. Additionally, the claimant through his attorney, Mr. Nicar, submitted a memorandum brief and supplemental memorandum to the Appeals Council. In his memorandum brief, claimant argues that claimant failed to properly present his case at the hearing; was uncounseled; has limited education and apparrently lacked a complete understanding of the proceedings. Claimant further argues that the additional medical evidence which claimant submitted to the Appeals Council supports claimant's statements that he was impaired and unable to work prior to September 30, 1976. Claimant also contends that the additional medical evidence as well as the other evidence submitted to the Administrative Law Judge shows that claimant

has suffered from high blood pressure for a number of years. Claimant takes exception to the finding of the Administrative Law Judge that the report of Jack Wolfe, D.O., did not indicate any blood pressure readings. Although the report of the physical examination of claimant by Dr. Wolfe, (Tr. 98) shows a blood pressure reading of 164/98, the final diagnosis of Dr. Wolfe, (Tr. 95), is as follows:

"1. Chronic Obstructive Lung Disease With Bronchietic Asthmatic Component.

2. CongestiveHeart Failure.

3. Type IV Hyperlipidemia.

4. Bilateral Lobar Pneumonia.

5. Osteochondroma Of The Right Elbow With Degenerative Arthritis.

6. Reactive VDRL and FTA Latent Syphilis.

7. Borderline Diabetes Mellitus."

Based on the records before the Administrative Law Judge at the time of the hearing the earliest medical evidence available to the Administrative Law Judge related to the hospitalization of claimant at the Oklahoma Osteopathic Hospital in March of 1975. The Administrative Law Judge also had before him the records of Claimant's hospitalization at the Oklahoma Osteopathic Hospital in November of 1977. From the 1975 and 1977 hospital records and reports, the Administrative Law Judge concluded that the evidence did not show that claimant was disabled from engaging in his work as the owner and operator of a used car lot on or before September 30, 1976 which was the last date on which the claimant met the special earnings requirement of the Social Security Act for disabled purposes. Plaintiff stated in his "Medical History and Disability Reports" of January 24, 1978, (Tr. 83), and September 26, 1977 (Tr. 76), and his "Application for Disability Insurance Benefits" dated September 26, 1977,

(Tr. 60), that he became unable to work in January 1976 due to his disability. A determination was made by the Social Security Administration that the claimant was disabled as of May 11, 1977 and not prior thereto. (Tr. 92-93). As noted above claimant was not insured for benefits after September 30, 1976.

The Appeals Council did consider the additional evidence submitted by claimant which included the medical report of Dr. David O. Marifield of November 21, 1972 and the letter of claimant's tax accountant, Mr. Haymon of August 17, 1978, and concluded that the additional evidence did not alter the conclusion of the Administrative Law Judge that the claimant's impairments were not of sufficient severity to prevent him from engaging in his usual work on or before September 30, 1976 when claimant last met the special earnings requiements for disability purposes.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping

Co., 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberrry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351, F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D. S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied,

407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

There appears to be no dispute about plaintiff's current disability. The sole issue resolved by the Secretary was that plaintiff failed in his burden of proving his disability on or before September 30, 1976, when his insured status expired. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972); Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971). Any impairment becoming disabling after a claimant is no longer insured for benefits cannot support an award of benefits. DeMandre v. Califano, 591 F.2d 1088 (5th Cir. 1979).

The hospital records of March 1975 show that plaintiff's respiratory impairment improved during his short hospital stay. Also plaintiff apparently continued to smoke despite his respiratory problems. See Hirst v. Gardner, 365 F.2d 125 (7th Cir. 1966); Emler v. Califano, 462 F.Supp. 109 (D. Kan. 1978). Although plaintiff's impairments did become progressivley worse, there is no evidence to support his claim that on or before September 30, 1976, they had worsened to a disabling degree. Demandre v. Califano, 591 F.2d 1088 (5th Cir. 1979).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 24th day of September, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION NO. 79-C-24-D |
| | ) | |
| WILLIE G. DAVIS, JR., et al., | ) | |
| | ) | |
| Defendants. | ) | |

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 21st day of ~~August~~ September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendant, Stewarts, Inc. appearing by its attorney, Janine H. VanValkenburgh; Defendants, County Treasurer, Tulsa County and Board of County Commissioners, Tulsa County, appearing by their attorney, Deryl L. Gotcher, Jr.; Federal Employees Credit Union of Oklahoma City, appearing by its attorney, Allen Klein; and Willie G. Davis, Jr., American Finance System, Ford Consumer Credit Company and Ed R. Crockett, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Willie G. Davis, Jr., was served by publication as shown on the Proof of Publication filed herein; that Defendants, American Finance System and Federal Employees Credit Union were both served with Summons and Complaint on January 16, 1979, as appears from United States Marshals Service herein; that Defendants, Ed R. Crockett and Stewarts, Inc. were both served with Summons and Complaint on January 24, 1979, as appears from U.S. Marshals Service herein; that Defendant Ford Consumer Credit Company was served with Summons and Complaint on January 17, 1979, as appears from United States Marshals Service herein; and that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were both served with Summons and Complaint on January 18, 1979, as appears from U. S. Marshals Service herein.

It appearing that the Defendant, Stewart's Inc. has duly filed its Disclaimer on April 3, 1979; that the Defendant, Federal

Employees Credit Union, has duly filed its answer on February 1, 1979; that the Defendants, County Treasurer, Tulsa County and Board of County Commissioners, Tulsa County have duly filed answers on February 5, 1979; and that the Defendants, Willie G. Davis, Jr., American Finance System, Ford Consumer Credit Company and Ed R. Crockett, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Ten (10), Block One (1), SUBURBAN ACRES FOURTH ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Willie G. Davis, Jr., did on the 2nd day of December, 1976, execute and deliver to the Administrator of Veterans Affairs, his mortgage and mortgage note in the sum of $9,750.00, with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Willie G. Davis, Jr., made default under the terms of the aforesaid mortgage note by reason of his failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendant is now indebted to the Plaintiff in the sum of $9,695.23 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from January 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from William G. and Kathleen A. Davis the sum of $_____ plus interest according to law for personal property taxes for the year(s) _____ and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Willie and Lillie P. Davis

the sum of $ 0 plus interest according to law for personal property taxes for the year(s) 0 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendant, Willie G. Davis, Jr., for the sum of $9,695.23 with interest thereon at the rate of 8 1/2 percent per annum from January 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against William G. & Kathleen A. Davis for the sum of $ 0 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Willie and Lillie P. Davis for the sum of $ 0 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, American Finance System, Federal Employees Credit Union, Ed R. Crockett, Stewarts, Inc., Ford Consumer Credit Company, County Treasurer, Tulsa County and Board of County Commissioners, Tulsa County.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to

advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, the Defendant and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

Assistant District Attorney
Attorney for Defendants,
County Treasurer and Board
of County Commissioners,
Tulsa County, Oklahoma

JANINE H. VAN VALKENBURGH
Attorney for Stewart's Inc.

ALLEN KLEIN
Attorney for Federal Employees
Credit Union of Oklahoma City

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| RONALD WESLEY REYNOLDS, c/b/a Mid-Western Painting Service, | ) | |
| | ) | |
| Bankrupt, | ) | |
| | ) | |
| PAN AMERICAN PAINT CO., d/b/a an Illinois Corporation, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| vs. | ) | No. 79-C-29-D |
| | ) | |
| RONALD WESLEY REYNOLDS, d/b/a Mid-Western Painting Service, | ) | |
| | ) | |
| Defendant-Appellee. | ) | |



O R D E R

This is an appeal by Pan American Paint Co. from the Judgment of the Bankruptcy Court entered on November 29, 1978, in Bankruptcy No. 75-B-1334, ordering that Pan American take nothing and dismissing the proceeding on the merits, and further ordering that the debt which was the subject of Pan American's complaint was dischargeable in bankruptcy and discharging that debt. The Court's jurisdiction herein is pursuant to 11 U.S.C. § 67(c), and this appeal is taken in conformity with Bankruptcy Rules 801-814.

Pan American presents two issues in its appeal: (1) whether the debt owed by Reynolds is non-dischargeable under § 17(a)(4) of the Bankruptcy Act [11 U.S.C. § 35(a)(4)]; and (2) whether the relationship established by Okla. Stat. tit. 42, §§ 152, 153 is such as to create a non-dischargeable debt upon breach of the relationship.

The record before this Court does not include a transcript of the proceedings before the Bankruptcy Court. The facts, as found by the Bankruptcy Judge from his consideration of the admissions, the testimony of Reynolds, and the permissible inferences to be drawn therefrom are these:

Approximately five years prior to bankruptcy, Reynolds was a self-employed painter. Reynolds purchased painting materials and supplies from Pan American during this time, and made payments to Pan American on these purchases. The record before this Court gives no details as to the times and amounts of these purchases. These supplies were used by Reynolds on various jobs, only one of which was identified as one where materials purchased from Pan American were used by Reynolds. On this particular job, Reynolds was paid approximately $1600.00,payment in full for materials and labor furnished. From these receipts, Reynolds made payments upon debts owing to Pan American and other creditors. There is no evidence of the amounts of these payments or the identities of creditors, other than Pan American, who received them.

At the time Reynolds took bankruptcy a balance was owed to Pan American in the amount of $615.31. As a creditor of the estate in bankruptcy, Pan American received a dividend, leaving a balance of $446.10 due at the time of the trial.

There is no evidence of whether Pan American ever filed a lien against the property of any party for whom Reynolds did work.

Under Rule 810 of the Bankruptcy Rules, the District Court is required to accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. The findings of the Bankruptcy Court will not be disturbed unless cogent reasons to reject these findings appear on the record. In the Matter of Vickers, 577 F.2d 683 (Tenth Cir. 1978); Wolfe v. Tri-State Insurance Co., 407 F.2d 16 (Tenth Circ. 1969); In re Perdue Housing Industries, Inc., 437 F.Supp. 36 (W.D.Okla. 1977).

Pan American argues that the specific debt in question is not dischargeable under § 17(a)(4) of the Bankruptcy Act, 11 U.S.C. § 35(a)(4), which provides that "a discharge in

bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." This result, Pan American contends, is a result of Reynolds' breach of his fiduciary duty toward Pan American. This duty, according to Pan American, is created by Okla. Stat. tit. 42, §§ 152, 153. Section 152 provides, in pertinent part, as follows:

> The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract.

The applicable portion of § 153 provides:

> Such trust funds shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.

In dealing with § 153, the Oklahoma Court of Appeals has stated that "[u]nless the lienable claim [is] perfected within 90 days of completion of the work or the furnishing of materials, the character of the claim [is] no longer "lienable." Bohn v. Divine, 544 P.2d 916, 920 (Okla. App. 1975). The Bankruptcy Court found that the evidence did not establish that any liens were filed, that it failed to establish whether any proceeds to which Okla. Stat. tit. 42, §§ 152 and 153 are applicable were diverted to a purpose other than the payment of valid lienable claims and that the evidence was inconclusive as to the disposition that Reynolds may have made of any contract proceeds.

One of the primary purposes of the Bankruptcy Act is the rehabilitation of debtors; exceptions to the operation of a discharge under the Act are to be strictly construed against a creditor, see, e.g., Gleason v. Thaw, 236 U.S. 558 (1914), In the Matter of Vickers, supra; Wukelic v. United

States, 544 F.2d 285 (Sixth Cir. 1976). The expansive interpretation urged by Pan American would be at odds with the purposes and aims of the Bankruptcy Act.

Pan American argues the applicability of In re Romero, 535 F.2d 618 (Tenth Cir. 1976). The Bankruptcy Judge concluded that Romero was inapplicable, because of the great differences between New Mexico's highly structured laws providing for the licensing of contractors and the Oklahoma laws involved herein. This Court agrees with the Bankruptcy Judge. Besides the obvious differences between New Mexico Stat. §§ 67-35-1 to 67-35-67 and Okla. Stat. tit. 42, § 152 and § 153, factual differences make that case clearly distinguishable from the situation presented herein.

The Court has made a searching and independent examination of the law relied upon by the Bankruptcy Judge and finds that his conclusions are correct. The Court has also reviewed the record and is satisfied that the Bankruptcy Court's findings are not clearly erroneous. The Court therefore adopts the Findings of Fact and Conclusions of Law entered in the Bankruptcy Court, as its own, and the judgment entered in accordance therewith is hereby affirmed.

It is so Ordered this 21 day of September, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| IN RE | ) | |
| | ) | |
| JAMES MICHAEL KENNON, | ) | |
| | ) | |
| Bankrupt, | ) | |
| | ) | |
| REPUBLIC BANK & TRUST COMPANY, a state banking institution, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 79-C-188-D |
| | ) | |
| JAMES MICHAEL KENNON, | ) | |
| | ) | |
| Defendant. | ) | |



O R D E R

This is an appeal from the judgment of the Bankruptcy Court filed March 2, 1979, wherein it was ordered and adjudged that Plaintiff, Republic Bank & Trust Company, recover of Defendant, James Michael Kennon, the sum of $2,795.00, plus interest and costs.

Republic Bank, a creditor of Defendant, sought a determination by the Bankruptcy Court that the debt owed to it by Defendant was non-dischargeable under § 17 of the Bankruptcy Act (11 U.S.C. § 35).

The record before this Court, as designated by Defendant, is brief, consisting of the Complaint, Answer, Notice of Appeal, Judgment, Designation of Record, the Exhibits introduced at the hearing of February 20, 1979, and a partial transcript, designated by Defendant as "a stenographic reproduction of the findings of fact, conclusions of law and decision of the referee made at the close of the hearing . . ." The testimony presented before the Bankruptcy Judge is not part of the record.

The exhibits disclose that a loan was arranged between Republic Bank and Defendant, secured by an automobile, which was to be purchased with the loan proceeds. Plaintiff's

Exhibit #6 shows that $3,000.00 was deposited to Defendant's checking account; the sum is designated as a "loan" on the deposit slip. Plaintiff's Exhibit #7 is a copy of a check, bearing Defendant's signature, and drawn on his account to the order of "cash" in the sum of $2,795.00. The total amount of debt evidenced by the promissory notes was $8,748.36.

Although the Bankruptcy Court did not make formal findings and conclusions, these were made orally and are contained in the partial transcript. From a reading of these oral findings and conclusions, it is clear that the Bankruptcy Judge found that the $2,795.00 withdrawn by Defendant from his checking account had been deposited there by the bank for a specific purpose; that Defendant, at the time he withdrew the $2,795.00 knew that the money was to be used for a specific purpose and that he retained the money and had the use and benefit of it for purposes other than that for which the funds were loaned; that the facts support the conclusion that there was some misrepresentation and wrongful intent in Defendant's obtaining and retaining this money.

The Bankrutpcy Judge concluded that Defendant's use of the sum in question for purposes other than those for which it was loaned was conversion; that the rest of the debt evidenced by the promissory notes was washed out, but that Defendant's use of the $2,795.00 was tortious and survived bankruptcy, and that Republic Bank was entitled to judgment in the amount of $2,795.00.

Under Rule 810 of the Bankruptcy Rules, the District Court is required to accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. This is especially true when the question of intent arises, as it does in a case such as this. The questions of Defendant's intent to make misrepresentations or to convert the funds in question are questions of fact, and the Bankruptcy Court's findings

are conclusive in the absence of clear error, e.g., Carini v. Matera, 592 F.2d 378 (Seventh Cir. 1979); In re Nelson, 561 F.2d 1342 (Ninth Cir. 1977). The findings of the Bankruptcy Court will not be disturbed unless cogent reasons to reject these findings appear on the record. In the Matter of Vickers, 577 F.2d 683 (Tenth Cir. 1978); Wolfe v. Tri-State Insurance Co., 407 F.2d 16 (Tenth Cir. 1969); In re Perdue Housing Industries, Inc., 437 F.Supp. 36 (W.D.Okla. 1977); 13 Collier on Bankruptcy ¶¶ 810.01-810.05. The burden is on the party appealing the Bankruptcy Court's decision to show that it is clearly erroneous, e.g., In re Transystems, Inc., 569 F.2d 1364 (Fifth Cir. 1978); Martin v. Mercantile Financial Corp., 404 F.2d 886 (Fifth Cir. 1969); In re Dawson, 446 F.Supp. 196 (E.D.Mo. 1978).

The Court has carefully examined the record, as designated by Defendant, and can find nothing that shows the judgment of the Bankruptcy Court to be clearly erroneous. Accordingly, the judgment of the Bankruptcy Court is hereby affirmed.

It is so Ordered this 21 day of September, 1979.

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, | ) | |
| Plaintiff, | ) | 76-C-528-C |
| vs. | ) | |
| JULIE BLOOMFIELD, et al., | ) | |
| Defendants. | ) | |



JUDGMENT

Based on the Order filed simultaneously with this Judgment, IT IS ORDERED that Judgment be entered in favor of Anthony Edward Bloomfield, a minor; Linda Bloomfield, Guardian of the Estate of Anthony Edward Bloomfield, a minor, and against Julie Bloomfield.

IT IS FURTHER ORDERED that upon proper application and Order that the funds on deposit with the Clerk of the Court be paid to Anthony Edward Bloomfield, a minor and Linda Bloomfield, Guardian of the Estate of Anthony Edward Bloomfield, a minor.

ENTERED this 21st day of September, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JACK HIGH and DONNA HIGH, Husband and Wife,

Plaintiffs,

CITY OF TULSA, OKLAHOMA, a municipal corporation,

Intervenor,

vs.

FORD MOTOR COMPANY; DELTA EQUIPMENT COMPANY, INC.; NATIONAL TRUCK EQUIPMENT COMPANY; THE FIRESTONE TIRE & RUBBER COMPANY; and FLEET TIRE SALES, INC.,

Defendants.

CONSOLIDATED

No. 78-C-515-D

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LILLIAN WOLARIDGE, Individually and as Surviving Mother for and on behalf of the Heirs, Executors, and Administrators of the Estate of Kenneth Wolaridge, Deceased,

Plaintiff,

CITY OF TULSA, OKLAHOMA, a municipal corporation,

Intervenor,

vs.

FORD MOTOR COMPANY; DELTA EQUIPMENT COMPANY, INC.; NATIONAL TRUCK EQUIPMENT COMPANY; THE FIRESTONE TIRE & RUBBER COMPANY; and FLEET TIRE SALES, INC.,

Defendants.

No. 79-C-160-D

---

CORDELIA HEARN, Individually and as Administratrix of the Estate of C. J. Hearn, Deceased, and C. J. HEARN, JR., CARLTON D. HEARN, and WANDA J. HEARN, Individually,

Plaintiffs,

vs.

FORD MOTOR COMPANY; DELTA EQUIPMENT COMPANY, INC.; NATIONAL TRUCK EQUIPMENT COMPANY; THE FIRESTONE TIRE & RUBBER COMPANY; and FLEET TIRE SALES, INC.,

Defendants.

No. 79-C-384-D



JOURNAL ENTRY OF JUDGMENT

## J U D G M E N T

On request of plaintiffs, JACK HIGH and DONNA HIGH, to the Clerk of this Court to enter default judgment against the defendant, FLEET TIRE SALES, INC., for said defendant's failure to plead or otherwise defend, as provided by the Federal Rules of Civil Procedure, Rule 55(b)(1), IT IS:

ORDERED pursuant to Rule 55(b)(1) of the Federal Rules of Civil Procedure that judgment be, and judgment is hereby entered for the plaintiff, JACK HIGH, against the defendant, FLEET TIRE SALES, INC., on the second cause of action of plaintiffs' Complaint, for the sum of $3,802,760.00.

IT IS FURTHER ORDERED, pursuant to Rule 55(b)(1) of the Federal Rules of Civicl Procedure, that judgment be, and judgment is hereby entered for the plaintiff, DONNA HIGH, against the defendant, FLEET TIRE SALES, INC., on the fourth cause of action of plaintiffs' Complaint, for the sum of $500,000.00.

/S/ Jack C. Silver
JACK C. SILVER, Clerk of the United States District Court for the Northern District of Oklahoma.

## CERTIFICATE OF MAILING

I, JEFFERSON G. GREER, do hereby state and certify that on the 20th day of September, 1979, I mailed a true and correct copy of the above and foregoing JOURNAL ENTRY OF JUDGMENT to the following attorneys of record, with sufficient postage thereon fully prepaid:

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Attorney for City of Tulsa, Oklahoma.

JEFFERSON G. CREER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LESTER L. SIMS,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS, Secretary of Health, Education, and Welfare,

Defendant.

CIVIL ACTION NO. 79-C-210-C



STIPULATION OF PARTIES TO DISMISSAL WITHOUT PREJUDICE

COME NOW the parties to the above styled cause and do hereby stipulate to the dismissal of this action without prejudice.

Lester L. Sims
LESTER L. SIMS

APPROVED:

George Blumpf
Attorney for Plaintiff

Robert P. Santee
ROBERT P. SANTEE
Attorney for Defendant

ORDER

Upon stipulation of the parties, this cause is hereby dismissed without prejudice.

(Signed) H. Dale Cook
JUDGE OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
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| HENRY CLAY SPERRY, Plaintiff, | ) | |
| vs. | ) | No. 79-C-218-C |
| PAT THOMPSON, Prosecutor for Tulsa County, State of Oklahoma; and CURTIS HANKS, Defendants. | ) | |



ORDER

The Court now considers the Motions to Dismiss of defendants Thompson and Hanks. One issue raised by both defendants is that they are not the proper parties defendant for the issues raised by petitioner. Defendant Thompson asserts that as a prosecutor, he has immunity to the charges raised by petitioner, and defendant Hanks states that as a police officer, he is incapable of rendering the relief that petitioner seeks. After carefully perusing the record, and being fully advised in all premises raised by the parties, and being fully aware that pro se civil rights complaints must be liberally construed, the Court must agree with defendants that they are not the proper parties to this action, are incapable of affording the requested relief, and that this action against them should be dismissed.

The Court notes the brief filed by petitioner on May 29, 1979, stating that he has insufficient training in law to enable him to prosecute this action, and requesting court-appointed counsel. That request was denied in this Court's Order dated June 19, 1979. On June 22, 1979, petitioner requested additional time to raise money for an attorney before responding to the motions to dismiss. On June 26, 1979, the Court granted petitioner three weeks to

advise the Court of his retention of counsel, and to advise the Court of how much time would be necessary to prepare responses to the motions to dismiss. To date, petitioner has not advised the Court of either.

For the foregoing reasons, defendants' Motions to Dismiss will be sustained.

It is so Ordered this 19th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 77-C-147-D |
| NEVER FAIL BUILDERS, INC., d/b/a Outrigger Apartments, | ) | |
| Defendant. | ) | |

JUDGMENT

Having reviewed the entire file in this case, the transcript of the proceedings had before the Honorable Robert S. Rizley, United States Magistrate, on September 19, 1978, and the briefs of the parties and the authorities contained therein, as is more fully set out in the Memorandum Opinion filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendant, Never Fail Builders, Incorporated, and against Plaintiff, Equal Employment Opportunity Commission.

It is so Ordered this 19th day of September, 1979.

Fred Daugherty

FRED DAUGHERTY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| MIDWEST MUTUAL INSURANCE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 79-C-405-C |
| JIMMY D. JOICE, and DEANA LYNN FLEETWOOD, individually and as next friend of CORA DAWN FLEETWOOD, a minor, | ) | |
| Defendants. | ) | |



O R D E R

The Court now considers defendants' Motions to Dismiss. This is an action by plaintiff insurance company for declaratory judgment on the propriety of an exclusionary clause in defendant Jimmy D. Joice's motorcycle insurance policy which excluded passengers from coverage. Defendants are suing plaintiff in Oklahoma state court on said insurance policy, alleging that oral representations were made to Joice that he had purchased a "full coverage" policy that would include passengers and that the actual policy did not cover passengers. In that action, Joice and his co-plaintiffs further allege that such an exclusionary clause is contrary to the public policy and the laws of Oklahoma, and request that it be declared void and without effect. Alternatively, the action in state court requests that the contract be reformed to reflect the agreement of the parties that it cover passengers.

In the action before this Court, plaintiff insurance company prays for a declaratory judgment declaring the rights, obligations, and liabilities of the parties herein only as to whether or not the passengers' liability exclusion within said policy was a valid and proper exclusion at law at said time; and that the defendants be enjoined and

restrained from prosecuting any claim against this carrier predicated upon the invalidity of said exclusion if held to have been a proper provision at that time.

Defendants argue that this action should be dismissed because plaintiff seeks to litigate in this Court the same issues that will be determined in the state court action. Plaintiff asserts that the issues are different. After careful perusal of the record, it is clear that defendants are correct and the issue in the instant case is identical to a portion of the issues in the state court action. It is therefore the view of this Court that this action should be dismissed for two reasons: 1) this litigation is repetitive of action in state court, and plaintiff should be able to litigate these issues fully in that action, and 2) this Court should avoid unnecessary interference with actions in state court. Miller v. Miller, 423 F.2d. 145 (10th Cir. 1970).

For the foregoing reasons, it is hereby ordered that defendants' Motions to Dismiss be sustained.

It is so Ordered this 19th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| ALEXANDER, ALYCE CRAYTON and MALINDA SMITH CRAYTON, Plaintiffs, | ) | |
| vs. | ) | No. 78-C-459-C |
| PATRICIA R. HARRIS, Individually, and as Secretary, THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Defendant. | ) | |



O R D E R

The Court now considers defendant's Motion for Summary Judgment based on plaintiffs' alleged failure to state a claim. The Court will treat this motion as one to Dismiss for Failure to State a Claim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

This is an action filed under the National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321 et seq., seeking declaratory and injunctive relief that would mandate defendant's compliance with NEPA in the consideration and/or approval of a multimillion dollar Community Development Block Grant under the Housing and Community Development Act, 42 U.S.C. §§ 5301 et seq. The Block Grant in question would go to the City of Tulsa, Oklahoma for its proposed Lansing Neighborhood Strategy Area Project. Plaintiffs are owners and residents of property in the project area.

Defendant argues that any challenge to its actions in this case must be made pursuant to the procedure for challenging administrative actions under the Administrative Procedures Act (APA), Title 5, U.S.C. §§ 500 et seq. Defendant further argues that any challenge to substantive environmental decisions must be made against the recipient of the funds, in this case, the City of Tulsa. Defendant points out that

plaintiffs have failed to do either of these. The Court would note that plaintiffs did invoke Title 5, U.S.C. §§ 701-706 in their complaint, which are the sections providing for judicial review of administrative actions. But plaintiffs have failed to allege sufficient facts, such as exhaustion of administrative remedies, to state a proper claim under the APA.

It is clear that an action challenging the award of block grant funds under §§ 5301 et seq. must be pleaded and prosecuted pursuant to the APA. Broaden v. Harris, 451 F.Supp. 1215 (W.D.Pa. 1978); City of Lebanon v. HUD, 422 F.Supp. 803 (M.D.Pa. 1976); NAACP v. Hills, 412 F.Supp. 102 (N.D.Cal. 1976); Ulster County Community Action Committee, Inc. v. Koenig, 402 F.Supp. 986 (S.D.N.Y. 1975). Fundamental to judicial review of administrative actions is the exhaustion of administrative remedies. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); Matter of Restland Memorial Park, 540 F.2d 626 (3rd Cir. 1976); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968). Plaintiffs have not alleged such recourse to administrative remedies; rather, they argue that defendant may be held accountable under NEPA. Of the various cases plaintiff offers in support of this proposition, only one is concerned with the Housing and Community Development Act; that case is Coalition for Block Grant Compliance v. HUD, 450 F.Supp. 43 (E.D.Mich. 1978). All the other cases are necessarily irrelevant to the issue this Court must consider: what is required of defendant under the Housing and Community Development Act. The language of § 5304(h) detailing the relationship of NEPA to the Housing and Community Development Act, provides that defendant's obligations under NEPA in this instance are satisfied when she approves of the release of funds to the applicant, who must have satisfied the requirements of § 5304(h), subparagraphs (1) and (3). If, as

plaintiffs argue, these requirements have not been followed by defendant and the applicant City of Tulsa, then plaintiffs may sue defendant, but they must do so under the APA. Broaden v. Harris, supra, City of Lebanon, supra, NAACP v. Hills, supra, Ulster County Coalition, supra. As noted above, plaintiff cited one case involving community block grants, Coalition v. HUD, supra, and that case was prosecuted under the theory of administrative abuse of discretion. It may seem that the Court is delving too heavily in technicalities to dismiss the instant action for plaintiffs' failure to invoke proper pleadings under the APA, but it is not merely a lack of terms of art that makes this action insufficient. Rather, it is plaintiffs' apparent failure to exhaust administrative remedies prior to resorting to judicial remedies.

For the foregoing reasons, this action will be dismissed for failure to state a claim, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

It is so Ordered this 18th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| NATIONAL RAILROAD PASSENGER CORPORATION, a foreign corporation, | ) | |
| Plaintiff, | ) | |
| -vs- | ) | |
| KOCH INDUSTRIES, INC., a corporation, et al., | ) | |
| Defendant, | ) | Case NO. 78-C-3-BC ✓ |
| KOCH INDUSTRIES, INC., a corporation, | ) | |
| Third Party Plaintiff, | ) | |
| -vs- | ) | |
| THE ATCHISON-TOPEKA & SANTA FE RAILWAY COMPANY, | ) | |
| Third Party Defendant. | ) | |



ORDER

Now, on this 13th day of September, 1979, this matter comes on for hearing on Objections to Findings and Recommendations of the Magistrate filed by plaintiff, National Railroad Passenger Corporation and third party defendant, The Atchison-Topeka & Santa Fe Railway Company. Plaintiff and third party defendant appeared and were represented by their counsel, Tom L. Armstrong and William K. Powers. Koch Industries, Inc. appeared and was represented by its counsel, John Edwards and Intervenor, Helen McMains appeared and was represented by her counsel, Frank A. Greer.

After studying the file and the briefs presented by all parties, and after hearing oral argument and being fully advised in the premises, the Court finds that the Objections to Findings and Recommendations of the Magistrate should be sustained.

IT IS, THEREFORE, ORDERED, as follows:

1. The Objections to Findings and Recommendations of the Magistrate filed by plaintiff National Railroad Passenger Corporation and third party defendant The Atchison-Topeka & Santa Fe Railway Company are hereby sustained;

2. The Joint Motion for New Trial, filed by defendant Koch Industries, Inc. and Intervenor Helen McMains is hereby overruled;

3. The jury verdicts, excepting that portion of the verdict setting plaintiff's damages, are hereby affirmed;

4. That portion of the jury verdict which fixed plaintiff's damages at $25,599.33 is hereby vacated and a new trial on the sole issue of the amount of plaintiff's damages is hereby ordered.

DATED this 18th day of September, 1979.

Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| SQUAW TRANSIT COMPANY, INC., Plaintiff, | ) | |
| vs. | ) | No. 78-C-420-C |
| OVERNIGHT TRANSPORTATION CORPORATION, a Virginia Corporation, Defendant. | ) | |

O R D E R

The Court now considers defendant's Motion to Transfer this action to the Western District of Kentucky, pursuant to Title 28 U.S.C.A. § 1404(a). This is an action to recover for damages allegedly caused by the negligent operation of defendant's semi-trailer truck by defendant's employee, Wallace W. Wilson, who allegedly drove his vehicle against plaintiff's vehicle as the latter was passing defendant's vehicle, allegedly damaging plaintiff's cargo and causing delay in the delivery of that cargo. The accident is stipulated to have occurred near Lake City, Kentucky, in the Western District of Kentucky. Plaintiff is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. Defendant is a Virginia corporation whose principal place of business is Richmond, Virginia; defendant corporation is licensed to do business in Oklahoma.

Defendant has moved to transfer this action to the Western District of Kentucky on the grounds that the convenience to the parties and witnesses, as well as the interests of justice, would better be served by litigating this action in that district. Title 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it

might have been brought."

Defendant argues that the only connection of this case with the State of Oklahoma is the fact that plaintiff is an Oklahoma corporation. In support of its argument, defendant offers several cases for the proposition that although "great weight should be given to plaintiff's choice of forum, this becomes a minimal consideration when 'none of the operative facts occur within the forum of [plaintiff's] selection . . .' Morgan v. Illinois Central Railroad Co., 161 F.Supp. 119, 120 (S.D.Tex. 1958)." Defendant's Brief in Support of Motion to Transfer, filed Jan. 22, 1979. p.2. Defendant argues further that three of its potential witnesses reside in or near the Western District of Kentucky, and moreover that the evidence is more readily available in that District. Plaintiff responds that while the evidence of the crash site may be nearer to the Kentucky court, it is equally discoverable by this Court, and that there are an equal number of witnesses living nearer to the Northern District of Oklahoma.

It is true that the plaintiff's choice of forum is to be given a certain deference, Norwood v. Kirkpatrick, 349 U.S. 29, 32, 75 S.Ct. 544, 546, 99 L.Ed. 789 (1954), or, as one court has stated, "the convenience of the aggrieved party should be first accomodated." Gardner Engineering Corporation v. Page Engineering Co., 484 F.2d 27, 33 (8th Cir. 1973). However, as Professor Wright points out, plaintiff's choice of forum is now given less weight than it was prior to the enactment of § 1404(a), when a forum non conveniens dismissal was the only alternative to retention of the case. See Wright, Miller, Cooper, Federal Practice & Procedure: Jurisdiction § 3848 pp. 239-251. Summing up the various court decisions on what burden defendant must carry to be entitled to a transfer, Wright states:

> These various forms of words on the weight to be given plaintiff's choice of forum are

> an attempt to verbalize the burden that defendant must carry in order to persuade the court that transfer should be granted. It is clear that the burden is on defendant, when it is the moving party, to establish why there should be a change of forum. It is not enough without more that the defendant would prefer another forum, nor is it enough merely to show that the claim arose elsewhere. Nor will transfer be ordered if the result is merely to shift the inconvenience from one party to the other.
>
> A long list of cases can be cited for the proposition that the balance of convenience must be strongly in favor of the moving party before a transfer will be ordered. Despite that impressive line of authority, it is possible to think, as some courts have, that this common formulation overstates the showing required. The language that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" initially appeared in a leading 1947 decision of the Supreme Court concerning dismissal on the ground of forum non conveniens. After Section 1404(a) was enacted in 1948, and at a time when many courts thought Section 1404(a) was merely a codification of forum non conveniens, the cases quite naturally applied that language to the new statute. In 1955 the Supreme Court made it clear that the statute was more than a codification, and that transfers can be granted under Section 1404(a) more freely than were dismissals under forum non conveniens. But by that time there were so many cases saying a Section 1404(a) transfer can be granted only if the balance is strongly in favor of the moving party that they had a momentum of their own, and later cases have cited and quoted them often without recognizing that the original source of this theory was in connection with forum non conveniens and that its application to Section 1404(a) is very doubtful.

(Footnotes omitted). Wright, supra, pp. 244-250.

Given that a transfer will not be ordered merely to shift the inconvenience from one party to the other, this Court notes that there are additional considerations in the instant case mandating its transfer. Foremost is the convenience to the prospective witnesses. The witnesses residing in the Northern District of Oklahoma that plaintiff argues would be inconvenienced by a transfer to Kentucky are all apparently employed by plaintiff. On the other hand, two of the witnesses living in or near the Western District of Kentucky -- the Kentucky State Trooper who investigated the accident, and a witness from Indiana -- are not employed by

either party. In this Court's view, it is more fair to require the plaintiff's employee-witnesses to travel than to make the Kentucky State Trooper and the witness from Indiana travel. A second consideration is the proof that exists in Kentucky. In other cases involving accidents in other forums, courts have ordered transfer because of the availability of proof there. Pope v. Missouri Pacific Railroad Co., 446 F.Supp. 447 (W.D.Okla. 1978); Lowry v. Chicago, R.I. & P. RR Co., 293 F.Supp. 867 (W.D.Okla. 1968); Koeneke v. Greyhound Lines, Inc., 289 F.Supp. 487 (W.D.Okla. 1968); Michell v. Farrell Lines, Inc., 350 F.Supp. 1325 (E.D.Pa. 1972); White v. Lykes Bros. S.S. Co., 333 F.Supp. 836 (E.D.Pa. 1971); Calderon Cordova v. Patrimonio Nacional, 277 F.Supp. 562 (S.D.N.Y. 1967); Garner v. Jaeger Machine Co., 331 F.Supp. 352 (S.D.Ohio 1971); Konousky v. Baltimore & O. R. Co., 185 F.Supp. 325 (W.D.Pa. 1960); Mims v. Proctor & Gamble Distributing Co., 257 F.Supp. 648 (D.C.S.C. 1966). The same result would seem in order here.

For the foregoing reasons, it is hereby ordered that defendant's Motion to Transfer be sustained, and that this action be transferred to the United States District Court for the Western District of Kentucky.

It is so Ordered this 14th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

L-5424



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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| NORTHEASTERN FIRE INSURANCE COMPANY OF PENNSYLVANIA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | NO. 79 C 570 C |
| NICK ANDREW, an individual, d/b/a N.A. ENTERPRISES, JOHN ANDREW and MICHAEL RAY HILBURN, | ) | |
| Defendants. | ) | |

NOTICE OF DISMISSAL

Please take notice that the above-entitled action is hereby dismissed without prejudice, pursuant to Rule 41 (a)(1)(i) of the Federal Rules of Civil Procedure.

Dated this 14th day of September, 1979.

BEST, SHARP, THOMAS, GLASS & ATKINSON
300 Oil Capital Building
Tulsa, Oklahoma 74103

By: _____
Robert L. Battoglia

RLB:rdm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

B.R. ELLIS, d/b/a
ACTION DELIVERY SERVICE and
EARLY AMERICAN INSURANCE COMPANY,

Plaintiffs,

-vs-

NO. 78-C-362-C

DANIEL MYNAHAN, Administrator
of the Estate of Ester Lynn
Stinnett, Deceased,

Defendant.

FILED
SEP 13 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

This action came on for trial the 28th day of August, 1979, before a jury of six and thereafter on the 29th day of August, 1979, the jury did return a verdict in favor of the Plaintiffs in the sum of $19,341.00. IT IS ORDERED AND ADJUDGED

That Plaintiffs B.R. Ellis, d/b/a Action Delivery Service and Early American Insurance Company, have judgment against the Defendant, Daniel R. Mynahan, as Administrator of the Estate of Ester Lynn Stinnett, deceased, in the sum of $19,341.00 plus interest thereon at the rate of 10% per annum from August 29, 1979.

Dated this 13th day of September, 1979.

H. Dale Cook, Chief United States District Judge

APPROVED AS TO FORM:

Steven J. Berg
Berringer, Briggs, Patterson, Eaton and Berg, Attorneys for Plaintiff

Richard Dan Wagner
Knight, Wagner, Stuart and Wilkerson, Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| United States of America, | ) | |
| | ) | |
| Plaintiff, | ) | CIVIL ACTION NO. 79-C-94-C |
| | ) | |
| vs. | ) | Tract No. 269--Part A |
| | ) | |
| 60.00 Acres of Land, More or Less, Situate in Washington County, State of Oklahoma, and Shell Oil Company, et al., and Unknown Owners, | ) | As to Oil Rights Only in the estate taken. |
| | ) | |
| Defendants. | ) | (Included in D.T. filed in Master File #400-14) |



J U D G M E N T

1.

Now, on this 13th day of September, 1979, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 269-Part A, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the property described in said Complaint. Pursuant thereto, on February 13, 1979, the United States of America filed its Declaration of Taking of a certain estate in such described property, and title

to the described estate in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of a certain estate in subject property a certain sum of money and all of this deposit has been disbursed, as set out below in paragraph 11.

7.

On the date of taking in this action, the owner of the estate taken in subject property was the defendant whose name is shown below in paragraph 11. Such named defendant is the only person asserting any interest in the estate taken in such property. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation awarded by this judgment.

8.

The owner of the subject property and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject property is in the amount shown as compensation in paragraph 11 below, and such Stipulation should be approved.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in the Complaint filed herein; and such property, to the extent of the estate described in such Complaint, is condemned, and title to such described estate is vested in the United States of America as of February 13, 1979, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such property.

10.

It is Further ORDERED, ADJUDGED and DECREED that on the date of taking the owner of the estate condemned herein in subject property was the defendant whose name appears below in paragraph 11 and the right to receive the just compensation for the estate taken herein in this property is vested in the party so named.

11.

It is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation, described in paragraph 8 above, hereby is confirmed; and the sum therein fixed is adopted as the award of just compensation for the estate condemned in subject property, as follows:

TRACT NO. 269-Part A

OWNER:

Shell Oil Company

| | | |
|---|---|---|
| Award of just compensation pursuant to Stipulation | $810.00 | $810.00 |
| Deposited as estimated compensation | $810.00 | |
| Disbursed to owner | | $810.00 |
| Balance due to owner | | None |

APPROVED:

CHIEF JUDGE, UNITED STATES DISTRICT COURT

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Respondent,<br><br>v.<br><br>VERNON JOHN LANE,<br>Defendant-Movant. | ) | NOS. 79-C-522-D<br>78-CR-110-B |

FILED
SEP 13 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration a pro se motion pursuant to 28 U.S.C. § 2255 filed by Vernon John Lane. The cause has been assigned civil Case No. 79-C-522-D and docketed in Movant's criminal Case No. 78-CR-110-B.

In the criminal case, Movant and a co-defendant were charged by indictment with a Dyer Act in violation of 18 U.S.C. §§ 2312 and 2. On November 13, 1978, Movant changed his plea to guilty and he was sentenced December 14, 1978, to an indeterminate period under the Youth Corrections Act, 18 U.S.C. § 5010(b), as a young adult offender as provided by 18 U.S.C. § 4216. Thereafter, a Rule 35, Federal Rules of Criminal Procedure, motion to modify sentence was sustained by Order of the Court dated and filed January 5, 1979, providing as follows:

> "The Defendant, Vernon John Lane, is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, regular adult sentence, and it is recommended that said sentence shall run concurrently with the sentence imposed December 27, 1978, in Case No. CRF-78-2882, by the District Court of Tulsa County, Oklahoma." (Emphasis added.)

The United States District Judge who conducted the plea and sentencing proceedings and granted the reduction of sentence has since died, but as a regularly assigned judge of this Court having reviewed the motion and file, and being fully advised in the premises, the Court finds that no response or evidentiary hearing is required and the present motion is without merit and should be overruled.

Movant in his pending motion states that he has made parole on his state sentence in Case No. CRF-78-2882 and a federal hold for the sentence herein has been placed against him. He contends that he has not been given credit on his federal sentence while in state custody and asserts that his co-defendant received only a 90-day sentence and

he received two years for the same crime. He asks that he be given credit on his federal sentence for the time served on the state sentence and placed on parole or that his federal sentence be reduced.

Considering the motion as a request for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, 120 days has expired from the date sentence was imposed and the motion must be overruled as out of time. The 120-day time limitation of Rule 35 is both mandatory and jurisdictional. United States v. Regan, 503 F.2d 234 (Eighth Cir. 1974) cert. denied Sub. Nom. 420 U. S. 1006 (1975); United States v. Flores, 507 F.2d 229 (Fifth Cir. 1975); United States v. United States District Court for the Central District of California, 509 F.2d 1352 (Ninth Cir. 1975); United States v. Robinson, 361 U. S. 220, 224-226 (1960); Urry v. United States, 316 F.2d 185 (Tenth Cir. 1963).

Considering the motion as a request for vacation of sentence pursuant to § 2255, the Court finds that Movant's federal sentence has been running concurrently with his state sentence, he has simply not completed his federal sentence although parole to the Horace Mann Community Treatment Center has been granted on the state sentence. Further, even if Movant were correct that the federal time were not running concurrently with the state sentence, the concurrency language was merely a recommendation as appears on the face of the modification order of January 5, 1979. Pursuant to 18 U.S.C. §§ 3568 and 4082(A), the Attorney General has the exclusive power to designate the place where federal sentences shall be served. Stillwell v. Looney, 207 F.2d 359, 361 (Tenth Cir. 1953); Werntz v. Looney, 208 F.2d 102, 103 n. 2 (Tenth Cir. 1953). The Tenth Circuit Court of Appeals has held that the place of confinement is not part of the sentence, but is a matter for the determination of the Attorney General; and therefore, that it is beyond the power of a federal court to order that its sentence be served concurrently with a state sentence. The concurrency language is surplusage or a recommendation as to place of confinement. Bowen v. United States, 174 F.2d 323 (Tenth Cir. 1949); Joslin v. Moseley, 420 F.2d 1204 (Tenth Cir. 1969); Sluder v. Malley, No. 77-1454 Unpublished

(Tenth Cir. filed Dec. 22, 1977). As has been done in this instance, the Attorney General has the discretion, may, and frequently does, honor the recommendation that the federal sentence be served concurrently with a state sentence in a state institution. See, Stillwell v. Looney, Supra.; Werntz v. Looney, Supra. However, the Attorney General is under no obligation to do so and could disregard the sentencing court's recommendation. See, Bowen v. United States, Supra.

Movant's claim of excessive sentence as compared to that of his co-defendant is without merit. Identical punishment for like crimes is not required by the Fourteenth Amendment of the United States Constitution; and there is no constitutional requirement that prisoners charged under the same statute, or different statutes, should receive like or comparable sentences so long as each sentence imposed is within the range provided by law. Williams v. Oklahoma, 358 U. S. 576, 585 (1959) reh. denied 359 U. S. 956; Williams v. New York, 337 U. S. 241 (1949) reh. denied 337 U. S. 961, 338 U. S. 841; Andrus v. Turner, 421 F.2d 290 (Tenth Cir. 1970).

If Movant wishes to challenge the parole commission's application of its guidelines to his case, that is an administrative responsibility unrelated to the sentencing process. That issue should be presented by way of habeas corpus, or possibly mandamus, to the United States District Court having jurisdiction over the South Central Region of the United States Parole Commission in Dallas, Texas.

IT IS, THEREFORE, ORDERED that Vernon John Lane be and is permitted to file his motion pursuant to 28 U.S.C. § 2255 in forma pauperis, and said § 2255 motion be and it is hereby overruled without prejudice to his presenting his challenge of the parole commission's application of its guidelines to his case in the proper forum in Texas, if necessary after his administrative remedies have been exhausted.

Dated this 13th day of September, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| GEORGE GRAYSON, Movant, | ) | |
| vs. | ) | No. 79-C-390-C |
| UNITED STATES DEPARTMENT OF JUSTICE, Respondent. | ) | |



O R D E R

This is an action under the Financial Right to Privacy Act, Title 12 U.S.C. § 3410, seeking an order from this Court preventing the disclosure of Movant's financial records held by Phoenix Federal Savings and Loan Assoc., Muskogee, Oklahoma, General Motors Acceptance Corp., Tulsa, Oklahoma, and Ford Consumer Credit Corp., Tulsa, Oklahoma. Movant alleges, and respondent verifies, that the records are being sought pursuant to a criminal investigation involving Movant, which resulted in the filing of an indictment in this Court against Movant, Case No. 79-Cr-48-C. Since the filing of the instant motion, Movant has pleaded guilty to the charge in 79-Cr-48-C, and was given a suspended sentence and three years probation on July 16, 1979. It would therefore appear that the instant motion is moot.

For the foregoing reason, Movant's motion for an order preventing access to financial records is hereby dismissed as moot.

It is so Ordered this 18th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEANNE HAYS, MARIE CLARK, VIRGIE GENTRY, JONITA MILLIGAN, JOAN LANGSTON, ZELPHA J. BARRETT, LLOYD A. MYERS, KATHRYN M. REYENGA, HELEN TINGLEY, OLEN WEVER, ORPHA WEVER, CARMA LEE BROCK, VIRGINIA OLIPHANT, SHIRLEY RIGGS, ELDITH ALLARD, INA MAE MCCOIN, LLOYD B. HELTZEL, LUCILLE HELTZEL, LORENE PAULEY, MITCHELL FREEMAN, LOUISE FREEMAN, ELLA HAUGHT, VIRGINIA HAUGHT, ANNA BELLE TAYLOR, CLARENCE WALKER, FAYE WALKER, ROBERT C. CAUGHON, MILDRED F. LEWIS, RUTH BLANKENSHIP, MARY L. HENDIRX, BETTY LOU BROWN, MAXINE DIXON, ELIZABETH SIMS, SUE HURN, C. J. POSTIER, CLARIBELL DEDA, JUANITA PEARCE, LEASTER E. REDMAN, HELEN WATSON and EDITH FERN COPELAND

Plaintiffs,

vs.

MINNESOTA PROTECTIVE LIFE INSURANCE COMPANY and RETIREMENT CONSULTANTS, INC.

Defendants.



No. 76-C-559-C

DISMISSAL WITH PREJUDICE
BY STIPULATION

Come now the plaintiffs and dismiss their cause with Prejudice to the rights to the bringing of any other future action.

CHAPEL, WILKINSON, RIGGS, ABNEY & KEEFER

By Bill Wilkinson
Bill V. Wilkinson
Attorneys for Plaintiffs
502 West Sixth Street
Tulsa, Oklahoma 74119

HOPKINS, WARNER & KING, INC.

By _____
Donald G. Hopkins
Attorneys for Defendants
1502 South Boulder, Suite 108
Tulsa, Oklahoma 74119

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

| | | |
|---|---|---|
| ELIZABETH M. FRICKE | ) | |
| | ) | |
| | ) | |
| vs | ) | No: 78-C-192-C |
| | ) | |
| | ) | |
| AMERICAN RED CROSS | ) | |

STIPULATION OF
DISMISSAL WITH PREJUDICE

The plaintiff, Elizabeth M. Fricke, and her attorney, Gerald E. Kamins, do hereby dismiss the above named and styled case as to both causes of action, thereby forever settling all claims under the causes of action and further allowing both parties to pay their respective costs of the action without obligation to either.

Further request that the Court accept this Dismissal under Rule 41 of the Federal Rules of Civil Procedure and that the Court strike from its Pre-Trial docket of September 28, 1979 the above case.

Respectfully submitted,

Elizabeth M. Fricke
Elizabeth M. Fricke
Plaintiff

Louise C. Tyler
LOUISE C. TYLER
HOUSTON AND KLEIN, INC.
404 South Boston
Tulsa, Oklahoma 74103
ATTORNEYS FOR DEFENDANT

Gerald E. Kamins
Gerald E. Kamins
Her Attorney
3150 East 41st Street, Suite 102
Tulsa, Oklahoma

CERTIFICATE OF MAILING

I, Gerald E. Kamins, do hereby state that a true and correct copy of the above and foregoing Dismissal has been delivered to David James and Houston and Klein, Inc., Sooner Federal Building, 404 South Boston Avenue, Tulsa, Oklahoma 74103, with sufficient postage thereon prepaid on this 11th day of September 1979.

Gerald E. Kamins
Gerald E. Kamins

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | |
|---|---|
| IN RE: RIFFE PETROLEUM COMPANY, a corporation, ASPHALT INTERNATIONAL, INC., a corporation, NU-WAY EMULSIONS, INC., a corporation, RIFFE MARINE CORPORATION, a corporation, and WEST BANK OIL, INC., a corporation,<br><br>Debtors, | Bankruptcy No. 78-B-509 |
| TOTAL PETROLEUM, INC., a Michigan corporation,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>RIFFE PETROLEUM COMPANY, a corporation in bankruptcy,<br><br>Defendant-Appellant. | Appeal No. 78-C-594-C |



O R D E R

This is an appeal from an Order of the bankruptcy court entered on November 2, 1978 in Bankruptcy No. 78-B-509 modifying the stay order and automatic stay entered therein so as to permit discovery to proceed against the debtor in Civil Case No. 78-C-288-C now pending before this Court. On March 19, 1979 this case was remanded to the bankruptcy court for the entry of Findings of Fact supporting the Order entered on November 2, 1978. On April 26, 1979, the bankruptcy judge filed his Findings of Fact and Conclusions of Law, to which the appellant takes exception.

The Court has made an independent examination of the facts found and the law relied upon by the bankruptcy judge and has determined that his findings of fact are not clearly erroneous, and that his conclusions of law are correct. The Court therefore adopts the Findings of Fact and Conclusions

of Law entered in the bankruptcy court, and the Order entered in accordance therewith is hereby affirmed.

It is so Ordered this 12th day of September, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA



IN RE: HABEAS CORPUS OF )
) No. 79-C-555-C
WALTER SPRINGER, JR., )

O R D E R

This matter having come on for hearing on September 5 and again on September 6, 1979, on petitioner's habeas corpus Motion made pursuant to Title 28, United States Code, Section 2255, the parties having been heard, and the Court being fully advised in the premises, the Court makes the following findings and conclusions:

1. That petitioner is currently incarcerated in State/local custody in the Tulsa County Jail, Tulsa, Oklahoma, as a result of his arrest on state misdemeanor charges of defrauding an innkeeper.

2. That bail in that state case has been fixed at $500, which petitioner has not yet posted or made, but which he claims can be made without a problem.

3. That petitioner was first arrested on these state charges on or about August 28, 1979.

4. That there is also a detainer currently lodged against petitioner at the county jail because of an arrest warrant issued in January, 1979, by the U. S. Army, charging petitioner with being absent without leave.

5. That if petitioner makes bail in the state case, he will then be available to and will be turned over to the U. S. Army military authorities, on the A.W.O.L. Warrant.

6. That although this Court has no jurisdiction to set bail on the A.W.O.L. Warrant as requested, it does have jurisdiction to determine if a violation of Due Process has occurred. Schlesinger v. Councilman, 420 U.S. 738 (1975).

7. That, at such time as petitioner is released on bail on the Oklahoma state charges and is then held only

by reason of the military detainer, if those military authorities do not pick him up and proceed to process petitioner within the rules provided in the U.C.M.J; then at such time, a Due Process problem may arise over which this Court would have proper jurisdiction and cognizance. Chaplin v. Lovelace, 510 F.2d 419 (8th Cir. 1975).

8. That under the present facts and circumstances before the Court, although the Court may have jurisdiction to intervene, it does not choose to do so. It is therefore;

ORDERED, ADJUDGED and DECREED that petitioner's motion for Habeas Corpus, pursuant to Title 28, United States Code, Section 2255, be, and the same is hereby, denied.

Dated this 12th day of September, 1979.

W. Wallace Kirkpatrick
Chief, U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| COMMUNICATION ASSOCIATES, INC., an Oklahoma corporation, Plaintiff, | ) | |
| vs. | ) | No. 79-C-500-D |
| ASSOCIATED COMPUTER INVESTORS, a Delaware corporation, Defendant. | ) | |

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Comes now Communication Associates, Inc., the plaintiff above named, by and through its attorney of record, Benjamin P. Abney, and, pursuant to the provisions of F.R.C.P. Rule 41(a)(1), hereby dismisses the above captioned cause without prejudice to the filing of a new action based upon the same facts at a later date, no Answer or Motion for Summary Judgment having been filed in this proceeding by the defendant herein as of this date.

Dated this 11th day of September, 1979.

Benjamin P. Abney
CHAPEL, WILKINSON, RIGGS, ABNEY
& KEEFER
502 West Sixth
Tulsa, Oklahoma 74119
(918) 587-3161

Certificate of Mailing

I certify that on the 11 day of September, 1979, a true, correct, and exact copy of the above Notice of Dismissal Without Prejudice was mailed to Bohanon & Barth, 2805 City National Bank Tower, Oklahoma City, Oklahoma 73102, and to Greenberg Keele Lunn & Aronberg, One IBM Plaza, Suite 4500, Chicago, Illinois 60611, with proper postage thereon.

Benjamin P. Abney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | |
| HOWARD K. WHALEN, Defendant. | ) | CIVIL ACTION NO. 79-C-470-C |

DEFAULT JUDGMENT

This matter comes on for consideration this 11th day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Howard K. Whalen, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Howard K. Whalen, was personally served with Summons and Complaint on July 30, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Howard K. Whalen, for the sum of $1,184.50, plus the costs of this action accrued and accruing.

/s/ H Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATHANIEL GOODMAN,

Plaintiff,

vs.

GEORGE PLATT, et al,

Defendants.

No. ~~G-77~~ 77-C-249-C

ORDER

George Platt, one of the defendants in this action, has filed herein his Motion for Summary Judgment seeking dismissal of the plaintiff's claims against him under Sections 1982 and 1985(3) of Title 42, United States Code. The plaintiff's claim against this defendant under 42 USC Sections 3610 and 3612 (Title VIII of the Civil Rights Act of 1968) were dismissed for the reasons stated in this court's order of January 24, 1978. The court has considered the Admissions, Answers to Interrogatories, and Depositions of the plaintiff, George Platt, Stephen B. Platt, and Don Estes on file herein and has carefully considered Briefs, authorities, and oral arguments of counsel for the plaintiff and George Platt. Based upon the foregoing, the court has determined that there is no conflict as to any material fact as the same relate to George Platt. Based upon the record, the court is satisfied that George Platt had no knowledge of the activities complained of by the plaintiff. The court, therefore, finds that George Platt's Motion for Summary Judgment should be sustained and the plaintiff's claims against him under 42 USC Sections 1982 and 1985(3) dismissed. Accordingly,

IT IS ORDERED that the Motion for Summary Judgment of George Platt be, and the same hereby is, granted.

DATED the 11th day of September, 1979.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

UNGERMAN, CONNER, LITTLE,
UNGERMAN & GOODMAN

By: _____
MAYNARD I. UNGERMAN
Attorney for the Plaintiff.

_____
PETER G. PIERCE, III
Attorney for Defendant
George Platt

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 78-C-597

Wilma Dickerson,

Plaintiff,

*vs.*

The Hughes Group,
A corporation,

Defendant.

**JUDGMENT**

This action came on for trial before the Court and a jury, Honorable Clarence A. Brimmer, , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdicts for the Plaintiff.

It is Ordered and Adjudged that having found in favor of the Plaintiff, Wilma Dickerson, and against the Defendant, The Hughes Group, assesses property damage of $9,000.00, and punitive damage of $10,000.00, plus interest.

It is further ordered and adjudged that the jury found for the Plaintiff, Wilma Dickerson, and against the Defendant, The Hughes Group, as to the Defendant's Counterclaim.

FILED

SEP 1 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 31st day of August, 19 79.

HONORABLE CLARENCE A. BRIMMER
UNITED STATES DISTRICT JUDGE

Clerk of Court
JACK C. SILVER

369

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CIVIL ACTION NO. 79-C-490-D |
| CONNIE M. WRIGHT a/k/a CONNIE MAC WRIGHT, Defendant. | ) | |

FILED

SEP 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 10th day of September, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 10th day of September, 1979.

Assistant United States Attorney

DOCKET NO. 330

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION



F I L E D

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION



Linda Davis v. United States of America, N. D. Okla., C.A. No. 79-C-505-C



CONDITIONAL TRANSFER ORDER

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 500 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68 (1978) the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979. and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

Inasmuch as no objection is pending at this time, the stay is lifted and this order becomes effective

SEP 6 1979

FOR THE PANEL:

Patricia D. Howard

Patricia D. Howard
Clerk of the Panel

Patricia D. Howard
Clerk of the Panel

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

| | | |
|---|---|---|
| UNITED STATES OF AMERICA and VICTOR J. RAYMOS, Manager, Tulsa Audit Group Department of Energy | ) | |
| Petitioners, | ) | |
| vs. | ) | Civil Action No. 78-C-566-C |
| ROBERT B. SUTTON, President, BPM, Ltd., | ) | |
| Respondent. | ) | |

ORDER

On the 10th day of September, 1979, the Court considered Petitioner's Motion to Dismiss. The Court finds that Petitioner's Motion to Dismiss should be granted, and it is accordingly;

Ordered, Adjudged and Decreed that the above entitled cause be, and the same is, hereby dismissed without prejudice.

It is so ordered this 10th day of September, 1979.

/s/ H. Dale Cook

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| AUDREY N. CANNON,<br><br>Plaintiff,<br><br>vs.<br><br>ROADWAY EXPRESS, INC., a corporation,<br><br>Defendant. | ) | No. 78-C-438-B |
| | ) | CONSOLIDATED |
| ZEDDIE A. CANNON,<br><br>Plaintiff,<br><br>vs.<br><br>ROADWAY EXPRESS, INC., a corporation,<br><br>Defendant. | ) | No. 78-C-439-B |



ORDER APPROVING STIPULATION OF DISMISSAL WITH PREJUDICE

On this 7th day of September, 1979, the Court, after review of the Stipulation of Dismissal With Prejudice, approves said Dismissal With Prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the parties' Stipulation of Dismissal With Prejudice shall be approved.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CENTRAL MUTUAL INSURANCE COMPANY, )
)
Plaintiff, )
)
vs. )
)
HERSCHEL EATON and CHARLES LEE EARL WISE, a/k/a LEE EARL WISE, )
)
Defendants. )

No. 78-C-39-B

FILED

SEP 7 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 4th day of September, 1979, the above numbered and styled cause comes on for trial on its merits before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff appears through their attorney of record, Hopkins, Warner & King, Inc., by Dale Warner, and Defendant Herschel Eaton appears in person and by his attorney, Terrill Corley, and Defendant Charles Lee Earl Wise, a/k/a Lee Earl Wise, appears not, and is in default.

Both parties present and announcing ready, a jury was thereupon empaneled and sworn upon their oath to well and truly try the issues of said cause. After hearing witnesses sworn and deposed in open Court and upon evidence having been received by said Court, both parties rested. The Court thereafter instructed the jury on the applicable law of the case and thereafter submitted special interrogatories to said jury.

After deliberation, said jury returned their verdict upon special interrogatories as follows:

That said insured, Lee Earl Wise, a/k/a Charles Lee Earl Wise, expected, with a high degree of certainty, the injuries resulting to Defendant Herschel Eaton, arising out of a shooting on March 13, 1977.

The Court finds, upon said verdict of special interrogatories, that there exists under Central Mutual Insurance

Company Policy No. FMH-8505710, issued to Charles Lee Earl Wise, a/k/a Lee Earl Wise, no coverage under the personal liability provisions of the Policy for injuries to said Herschel Eaton arising out of said shooting on March 13, 1977, upon the grounds and for the reason that there is an applicable policy exclusion as follows:

> "f. To bodily injury or property damage which is either expected or intended from the standpoint of the insured."

It is further found by the Court that the Defendant Charles Lee Earl Wise, a/k/a Lee Earl Wise, was duly served with summons in the cause pending herein, but has totally and wholly failed to appear or answer in this cause and is in default.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, that the allegations of Plaintiff's Complaint herein filed by Central Mutual Insurance Company are hereby sustained and that there is no liability or coverage to Charles Lee Earl Wise, a/k/a Lee Earl Wise, under the Central Mutual Insurance Company Policy No. FMH-8505710. Further, that default judgment was entered in favor of the Plaintiff Central Mutual Insurance Company and against the Defendant Charles Lee Earl Wise, a/k/a Lee Earl Wise, for his failure to answer the summons heretofore served upon him.

S/ Aldon J. Anderson

JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| INDUSTRIAL CYLINDERS COMPANY, formerly Pressed Steel Tank Co., Inc., a corporation, | ) | |
| Plaintiff, | ) | |
| vs. | ) | No. 77-C-442-B |
| PRESTCO, INC., a corporation and SKE-COR LEASING, | ) | |
| Defendants. | ) | |

FILED

SEP 6 19

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of Dismissal with Prejudice submitted herein, the Court finds that all disputes, claims and counterclaims involved in the above captioned action have been finally and completely resolved.

WHEREFORE, the Court does hereby enter its order dismissing with prejudice all claims and counterclaims set forth by the parties in this action.

SO ORDERED this 6 day of Sept, 1979.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, and JOHN R. THOMAS, Special Agent, Internal Revenue Service, Petitioners, | ) | |
| v. | ) | No. 79-C-482-C |
| BOULDERBANK & TRUST COMPANY and JO POTTS, Cashier, Respondents, | ) | |
| v. | ) | |
| DR. STANLEY J. GELLER, ET AL., Petitioners. | ) | |



ORDER

The Court has for consideration Petitioners' Petition to Enforce Internal Revenue Summonses and has reviewed the file, the briefs and the recommendations of the Magistrate concerning the Petition. On August 13, 1979, the date of the show cause hearing, the Court received a mailgram from The Northside Medical Clinic of Tulsa, Inc. (Clinic), Dr. Stanley J. Geller (Dr. Geller), and Joyce Henderson Geller (Joyce Geller) in which Clinic, Dr. Geller and Joyce Geller objected to producing the records subpoenaed on the grounds of self-incrimination and requested that they be made parties to the proceedings and that the proceedings be transferred to Los Angeles. On that same date the Court entered a minute ordering that Clinic, Dr. Geller and Joyce Geller be made parties to these proceedings.

On August 14, 1979 the Magistrate filed Findings and Recommendations. On August 21, 1979 Clinic, Dr. Geller and Joyce Geller sent a mailgram renewing their objections to the production of the bank records. On August 22, 1979 the Court directed the Clerk of the Court to advise Clinic, Geller and Joyce Geller that the Mailgram of August 21, 1979

would not be filed in this case because the Mailgram was not in proper form so as to comply with the Rules of the Court. No further pleadings or other correspondence has been received from Clinic, Geller or Joyce Geller. There have been no objections filed to the Findings and Recommendations of the Magistrate by Boulderbank and Trust Company and Jo Potts, Cashier. The time for filing objections to the Findings and Recommendations of the Magistrate has expired.

At the show cause hearing, the Petitioner, John R. Thomas (Thomas), Special Agent, Criminal Division, Internal Revenue Service testified that he is conducting a joint investigation to determine the correct federal tax liabilities of Clinic, Dr. Geller, and Joyce Geller for the years 1975, 1976 and 1977 and possible criminal violations; that he caused the summonses to be issued for the purpose of obtaining information concerning the items sought by the summonses; that the items sought by the summonses were necessary for the proper determination of the federal tax liability of Clinic, Dr. Geller and Joyce Geller; that he has none of the records sought by the summonses and that he needs the information concerning the items sought by the summonses for purposes of the joint investigation.

There was no evidence produced at the hearing to show bad faith, harrassment, or improper purpose on the part of the Internal Revenue Service in issuing the summonses.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The summonses in question in this matter were duly and properly served upon respondents.

2. At the time of the service of the summonses in question the Internal Revenue Service was and is conducting a joint investigation into the tax liability of Clinic, Dr. Geller and Joyce Geller.

3. At the time of the service of the summonses, and continuing up to this date, the records and documents summoned were and are relevant and necessary to the proper determination by the Internal Revenue Service of the tax liabilities of Clinic, Dr. Geller and Joyce Geller.

4. The information sought by the summonses is not in the possession of the Internal Revenue Service, nor could Petitioners practically or reasonably obtain such information by any other means.

5. The summonses were issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose in aid of a joint tax investigation, which might lead to civil and/or criminal liability.

6. There has been no showing that the "sole objective", or even the primary objective, of the summonses, was or is to support a criminal prosecution.

7. Criminal prosecution of Clinic, Dr. Geller and Joyce Geller has not been instituted, nor is it pending, nor has the investigation been recommended or referred by the Internal Revenue Service to the Department of Justice for ciminal prosecution.

8. Respondents have not complied with the summonses or any part of the summonses, and respondents refusal to comply with the summonses is based upon Clinic, Dr. Geller and Joyce Geller's request to respondents not to comply with the summonses.

9. The administrative steps required by the Internal Revenue Code have been followed.

CONCLUSIONS OF LAW

1. The summonses in question in this matter were duly and properly served upon respondents. 26 U.S.C. §§ 7402, 7604.

2. The summonses were issued and served by the Internal

Revenue Service in good faith and for a legitimate and proper purpose within the meaning of those terms expressed in Donaldson v. United States, 400 U.S. 517 (1971); United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972); and United States v. La Salle National Bank, 437 U.S. 298 (1978).

3. The information and records sought by the summonses is relevant and necessary to the proper determination by the Internal Revenue Service of the tax liability of Clinic, Dr. Geller and Joyce Geller and such information and records are not in the possession of the Internal Revenue Service. United States v. Powell, 379 U.S. 48 (1964).

4. This Court has jurisdiction to enforce the summonses in this matter pursuant to 26 U.S.C., Section 7402(b) and 7604(a), and pursuant to the general enforcement of writs powers of the Court. Donaldson, supra.

IT IS, THEREFORE, ORDERED that Petitioners' Petition to Enforce Internal Revenue Summonses as against each of the Respondents be and is hereby granted as set forth in the summonses.

IT IS FURTHER ORDERED that Respondents produce the records sought in the summonses within 10 days at the location specified in the summonses.

Dated this 5th day of September, 1979.

H. DALE COOK
CHIEF JUDGE

FILED

SEP 8 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| DAISY J. FRANK, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Case No. 75-C-439-B |
| | ) | |
| LIBERTY GLASS COMPANY, et al., | ) | |
| | ) | |
| Defendants. | ) | |

STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, DAISY J. FRANK, by and through her attorney of record, and does hereby dismiss the above entitled cause with prejudice as against both of the named Defendants, LIBERTY GLASS COMPANY, an Oklahoma corporation, and the GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA. Plaintiff affirmatively states and acknowledges herein that this Dismissal is to serve and is intended to serve as a complete and total barr to any and all further actions of the Plaintiff, as against these Defendants, and each of them, arising out of the Plaintiff's employment with the Defendant, LIBERTY GLASS COMPANY.

Frederic N. Schneider III
FREDERIC N. SCHNEIDER, III,
Attorney for Plaintiff.

Daisy J. Frank
DAISY J. FRANK, Plaintiff

Tom R. Gann
TOM R. GANN,
Attorney for Defendant
Liberty Glass Company

Thomas Dee Frasier
THOMAS DEE FRASIER,
Attorney for Defendant
Glass Bottle Blowers Association
of the United States and Canada

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, and JOHN R. THOMAS, Special Agent, Internal Revenue Service, | ) | |
| Petitioners, | ) | |
| v. | ) | No. 79-C-483-C |
| BANK OF COMMERCE & TRUST COMPANY and DAISYE HOWELL, Cashier, | ) | |
| Respondents. | ) | |
| v. | ) | |
| DR. STANLEY J. GELLER, ET AL., | ) | |
| Petitioners. | ) | |



ORDER

The Court has for consideration Petitioners' Petition to Enforce Internal Revenue Summonses and has reviewed the file, the briefs and the recommendations of the Magistrate concerning the Petition. On August 13, 1979, the date of the show cause hearing, the Court received a mailgram from The Northside Medical Clinic of Tulsa, Inc. (Clinic), Dr. Stanley J. Geller (Dr. Geller), and Joyce Henderson Geller (Joyce Geller) in which Clinic, Dr. Geller and Joyce Geller objected to producing the records subpoenaed on the grounds of self-incrimination and requested that they be made parties to the proceedings and that the proceedings be transferred to Los Angeles. On that same date the Court entered a minute ordering that Clinic, Dr. Geller and Joyce Geller be made parties to these proceedings.

On August 14, 1979 the Magistrate filed Findings and Recommendations. On August 21, 1979 Clinic, Dr. Geller and Joyce Geller sent a mailgram renewing their objections to the production of the bank records. On August 22, 1979 the Court directed the Clerk of the Court to advise Clinic, Geller and Joyce Geller that the Mailgram of August 21, 1979

would not be filed in this case because the Mailgram was not in proper form so as to comply with the Rules of the Court. No further pleadings or other correspondence has been received from Clinic, Geller or Joyce Geller. There have been no objections filed to the Findings and Recommendations of the Magistrate by Bank of Commerce & Trust Company and Daisye Howell, Cashier. The time for filing objections to the Findings and Recommendations of the Magistrate has expired.

At the show cause hearing, the Petitioner, John R. Thomas (Thomas), Special Agent, Criminal Division, Internal Revenue Service testified that he is conducting a joint investigation to determine the correct federal tax liabilities of Clinic, Dr. Geller, and Joyce Geller for the years 1975, 1976 and 1977 and possible criminal violations; that he caused the summonses to be issued for the purpose of obtaining information concerning the items sought by the summonses; that the items sought by the summonses were necessary for the proper determination of the federal tax liability of Clinic, Dr. Geller and Joyce Geller; that he has none of the records sought by the summonses and that he needs the information concerning the items sought by the summonses for purposes of the joint investigation.

There was no evidence produced at the hearing to show bad faith, harrassment, or improper purpose on the part of the Internal Revenue Service in issuing the summonses.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The summonses in question in this matter were duly and properly served upon respondents.

2. At the time of the service of the summonses in question the Internal Revenue Service was and is conducting

a joint investigation into the tax liability of Clinic, Dr. Geller and Joyce Geller.

3. At the time of the service of the summonses, and continuing up to this date, the records and documents summoned were and are relevant and necessary to the proper determination by the Internal Revenue Service of the tax liabilities of Clinic, Dr. Geller and Joyce Geller.

4. The information sought by the summonses is not in the possession of the Internal Revenue Service, nor could Petitioners practically or reasonably obtain such information by any other means.

5. The summonses were issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose in aid of a joint tax investigation, which might lead to civil and/or criminal liability.

6. There has been no showing that the "sole objective", or even the primary objective, of the summonses, was or is to support a criminal prosecution.

7. Criminal prosecution of Clinic, Dr. Geller and Joyce Geller has not been instituted, nor is it pending, nor has the investigation been recommended or referred by the Internal Revenue Service to the Department of Justice for ciminal prosecution.

8. Respondents have not complied with the summonses or any part of the summonses, and respondents refusal to comply with the summonses is based upon Clinic, Dr. Geller and Joyce Geller's request to respondents not to comply with the summonses.

9. The administrative steps required by the Internal Revenue Code have been followed.

CONCLUSIONS OF LAW

1. The summonses in question in this matter were duly and properly served upon respondents. 26 U.S.C. §§ 7402, 7604.

2. The summonses were issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose within the meaning of those terms expressed in Donaldson v. United States, 400 U.S. 517 (1971); United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972); and United States v. La Salle National Bank, 437 U.S. 298 (1978).

3. The information and records sought by the summonses is relevant and necessary to the proper determination by the Internal Revenue Service of the tax liability of Clinic, Dr. Geller and Joyce Geller and such information and records are not in the possession of the Internal Revenue Service. United States v. Powell, 379 U.S. 48 (1964).

4. This Court has jurisdiction to enforce the summonses in this matter pursuant to 26 U.S.C., Section 7402(b) and 7604(a), and pursuant to the general enforcement of writs powers of the Court. Donaldson, supra.

IT IS, THEREFORE, ORDERED that Petitioners' Petition to Enforce Internal Revenue Summonses as against each of the Respondents be and is hereby granted as set forth in the summonses.

IT IS FURTHER ORDERED that Respondents produce the records sought in the summonses within 10 days at the location specified in the summonses.

Dated this 5th day of September, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, and JOHN R. THOMAS, Special Agent, Internal Revenue Service, Petitioners, | ) | |
| v. | ) | No. 79-C-480-C |
| AMERICAN STATE BANK and WILLIAM X. SMITH, Vice President, Respondents, | ) | |
| DR. STANLEY J. GELLER, et al., Petitioners. | ) | |



O R D E R

The Court has for consideration Petitioners' Petition to Enforce Internal Revenue Summonses and has reviewed the file, the briefs and the recommendations of the Magistrate concerning the Petition. On August 13, 1979, the date of the show cause hearing, the Court received a mailgram from The Northside Medical Clinic of Tulsa, Inc. (Clinic), Dr. Stanley J. Geller (Dr. Geller), and Joyce Henderson Geller (Joyce Geller) in which Clinic, Dr. Geller and Joyce Geller objected to producing the records subpoenaed on the grounds of self-incrimination and requested that they be made parties to the proceedings and that the proceedings be transferred to Los Angeles. On that same date the Court entered a minute ordering that Clinic, Dr. Geller and Joyce Geller be made parties to these proceedings.

On August 14, 1979 the Magistrate filed Findings and Recommendations. On August 21, 1979 Clinic, Dr. Geller and Joyce Geller sent a mailgram renewing their objections to the production of the bank records. On August 22, 1979 the Court directed the Clerk of the Court to advise Clinic, Geller and Joyce Geller that the Mailgram of August 21, 1979

would not be filed in this case because the Mailgram was not in proper form so as to comply with the Rules of the Court. No further pleadings or other correspondence has been received from Clinic, Geller or Joyce Geller. There have been no objections filed to the Findings and Recommendations of the Magistrate by American State Bank and William X. Smith, Vice President. The time for filing objections to the Findings and Recommendations of the Magistrate has expired.

At the show cause hearing, the Petitioner, John R. Thomas (Thomas), Special Agent, Criminal Division, Internal Revenue Service testified that he is conducting a joint investigation to determine the correct federal tax liabilities of Clinic, Dr. Geller, and Joyce Geller for the years 1975, 1976 and 1977 and possible criminal violations; that he caused the summonses to be issued for the purpose of obtaining information concerning the items sought by the summonses; that the items sought by the summonses were necessary for the proper determination of the federal tax liability of Clinic, Dr. Geller and Joyce Geller; that he has none of the records sought by the summonses and that he needs the information concerning the items sought by the summonses for purposes of the joint investigation.

There was no evidence produced at the hearing to show bad faith, harrassment, or improper purpose on the part of the Internal Revenue Service in issuing the summonses.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The summonses in question in this matter were duly and properly served upon respondents.

2. At the time of the service of the summonses in question the Internal Revenue Service was and is conducting

a joint investigation into the tax liability of Clinic, Dr. Geller and Joyce Geller.

3. At the time of the service of the summonses, and continuing up to this date, the records and documents summoned were and are relevant and necessary to the proper determination by the Internal Revenue Service of the tax liabilities of Clinic, Dr. Geller and Joyce Geller.

4. The information sought by the summonses is not in the possession of the Internal Revenue Service, nor could Petitioners practically or reasonably obtain such information by any other means.

5. The summonses were issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose in aid of a joint tax investigation, which might lead to civil and/or criminal liability.

6. There has been no showing that the "sole objective", or even the primary objective, of the summonses, was or is to support a criminal prosecution.

7. Criminal prosecution of Clinic, Dr. Geller and Joyce Geller has not been instituted, nor is it pending, nor has the investigation been recommended or referred by the Internal Revenue Service to the Department of Justice for ciminal prosecution.

8. Respondents have not complied with the summonses or any part of the summonses, and respondents refusal to comply with the summonses is based upon Clinic, Dr. Geller and Joyce Geller's request to respondents not to comply with the summonses.

9. The administrative steps required by the Internal Revenue Code have been followed.

CONCLUSIONS OF LAW

1. The summonses in question in this matter were duly and properly served upon respondents. 26 U.S.C. §§ 7402, 7604.

2. The summonses were issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose within the meaning of those terms expressed in Donaldson v. United States, 400 U.S. 517 (1971); United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972); and United States v. La Salle National Bank, 437 U.S. 298 (1978).

3. The information and records sought by the summonses is relevant and necessary to the proper determination by the Internal Revenue Service of the tax liability of Clinic, Dr. Geller and Joyce Geller and such information and records are not in the possession of the Internal Revenue Service. United States v. Powell, 379 U.S. 48 (1964).

4. This Court has jurisdiction to enforce the summonses in this matter pursuant to 26 U.S.C., Section 7402(b) and 7604(a), and pursuant to the general enforcement of writs powers of the Court. Donaldson, supra.

IT IS, THEREFORE, ORDERED that Petitioners' Petition to Enforce Internal Revenue Summonses as against each of the Respondents be and is hereby granted as set forth in the summonses.

IT IS FURTHER ORDERED that Respondents produce the records sought in the summonses within 10 days at the location specified in the summonses.

Dated this 5th day of September, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, and JOHN R. THOMAS, Special Agent, Internal Revenue Service, Petitioners, | ) | |
| v. | ) | No. 79-C-481-D |
| F&M BANK & TRUST COMPANY, and MARY SIMMONS, Cashier, Respondents. | ) | |



ORDER

The Court has for consideration Petitioners' Petition to Enforce Internal Revenue Summons and has reviewed the file, the briefs and the recommendations of the Magistrate concerning the Petition. There have been no objections filed to the Findings and Recommendations of the Magistrate and the time for filing such objections has expired.

The Northside Medical Clinic of Tulsa, Inc. (Clinic), Dr. Stanley J. Geller (Dr. Geller), and Joyce Henderson Geller (Joyce Geller) have objected to Respondents complying with the summons.

The Petitioner, John R. Thomas (Thomas), Special Agent, Criminal Division, Internal Revenue Service testified that he is conducting a joint investigation to determine the correct federal tax liabilities of Clinic, Dr. Geller, and Joyce Geller for the years 1975, 1976 and 1977 and possible criminal violations; that he caused the summons to be issued for the purpose of obtaining information concerning the items sought by the summons; that the items sought by the summons were necessary for the proper determination of the federal tax liability of Clinic, Dr. Geller and Joyce Geller; that he has none of the records sought by the summons and that he needs the information concerning the items sought by the summons for purposes of the joint investigation.

There was no evidence produced at the hearing to show bad faith, harrassment, or improper purpose on the part of the Internal Revenue Service in issuing the summons.

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The summons in question in this matter was duly and properly served upon respondents.

2. At the time of the service of the summons in question the Internal Revenue Service was and is conducting a joint investigation into the tax liability of Clinic, Dr. Geller and Joyce Geller.

3. At the time of the service of the summons, and continuing up to this date, the records and documents summoned were and are relevant and necessary to the proper determination by the Internal Revenue Service of the tax liabilities of Clinic, Dr. Geller and Joyce Geller.

4. The information sought by the summons is not in the possession of the Internal Revenue Service, nor could Petitioners practically or reasonably obtain such information by any other means.

5. The summons was issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose in aid of a joint tax investigation, which might lead to civil and/or criminal liability.

6. There has been no showing that the "sole objective", or even the primary objective, of the summons, was or is to support a criminal prosecution.

7. Criminal prosecution of Clinic, Dr. Geller and Joyce Geller has not been instituted, nor is it pending, nor has the investigation been recommended or referred by the Internal Revenue Service to the Department of Justice for ciminal prosecution.

8. Respondents have not complied with the summons or any part of the summons, and respondents refusal to comply with the summons is based upon Clinic, Dr. Geller and Joyce Geller's request to respondents not to comply with the summons.

9. The administrative steps required by the internal Revenue Code have been followed.

CONCLUSIONS OF LAW

1. The summons in question in this matter was duly and properly served upon respondents. 26 U.S.C. §§ 7402, 7604.

2. The summons was issued and served by the Internal Revenue Service in good faith and for a legitimate and proper purpose within the meaning of those terms expressed in Donaldson v. United States, 400 U.S. 517 (1971); United States v. Billingsley, 469 F.2d 1208 (10th Cir. 1972); and United States v. La Salle National Bank, 437 U.S. 298 (1978).

3. The information and records sought by the summons is relevant and necessary to the proper determination by the Internal Revenue Service of the tax liability of Clinic, Dr. Geller and Joyce Geller and such information and records are not in the possession of the Internal Revenue Service. United States v. Powell, 379 U.S. 48 (1964).

4. This Court has jurisdiction to enforce the summons in this matter pursuant to 26 U.S.C., Section 7402(b) and 7604(a), and pursuant to the general enforcement of writs powers of the Court. Donaldson, supra.

IT IS, THEREFORE, ORDERED that Petitioners' Petition to Enforce Internal Revenue Summons as against each of the Respondents be and is hereby granted as set forth in the summons.

IT IS FURTHER ORDERED that Respondents produce the

records sought in the summons within 10 days at the location specified in the summons.

Dated this 4th day of September, 1979.

Fred Daugherty
United States District Judge

RATNER, MATTOX, RATNER, BARNES & KINCH, P.A.
Attorneys at Law
444 North Market, P. O. Box 306
Wichita, Kansas 67201
(316) 262-6423



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. C. McCANS, JR.,

Plaintiff,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,

Defendant.

CIVIL ACTION NO.
77-C-466-C

APPLICATION TO DISMISS

COMES NOW the Plaintiff, J. C. McCans, Jr., and moves the Court for an order dismissing his complaint in the above-captioned matter for the reason that all issues raised by said complaint have been compromised and settled by the parties.

CHARLES E. DANIEL
128 East Broadway
Drumright, Oklahoma 74020

RATNER, MATTOX, RATNER, BARNES & KINCH, P.A.
444 North Market, P. O. Box 306
Wichita, Kansas 67201

Attorneys for Plaintiff

By E. L. Kinch
E. L. KINCH



ORDER OF DISMISSAL WITH PREJUDICE

Now on this 4th day of ~~August~~ September, 1979, the Plaintiff appearing by his attorneys, Charles E. Daniel and Ratner, Mattox, Ratner, Barnes & Kinch, P.A., and the Defendant appearing by its

attorneys, Franklin, Harmon and Satterfield, Inc., and it being made to appear to the Court that all matters and things which are or which might have been in controversy herein have been compromised and settled by the parties, upon motion of the Plaintiff and the consent of the Defendant,

IT IS BY THE COURT ORDERED that this cause be and the same is hereby dismissed with prejudice and the costs herein assessed to the Defendant.

s/ Orden J. Anderson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM CLAUDE WESTON, individually and as Successor Executor of the Estate of John J. Weston, Deceased,

Plaintiff,

-vs-

EVERETT E. BERRY, ROBERT M. MURPHY, and LYNN OSBORN,

Defendants.

No. 77-C-429-D



JUDGMENT

Upon Defendant's Motion for Partial Summary Judgment, the Court having considered the depositions, affidavits and pleadings on file, as well as the briefs and arguments of counsel, as is more fully set out in the Memorandum Opinion filed of even date,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and hereby is granted in favor of Defendants and against Plaintiff William Claude Weston on Plaintiff's claims in his individual capacity including Plaintiff's individual claim for punitive damages and the same are hereby dismissed.

IT IS FURTHER ORDERED that Defendants' motion insofar as it pertains to the liability of Defendants Murphy and Osborn be and hereby is overruled.

IT IS FURTHER ORDERED that Defendants' motion, insofar as it pertains to Plaintiff's allegations seeking imposition of a constructive trust upon Defendant Berry's attorneys' fees be and hereby is sustained, and judgment granted thereon in favor of Defendants and against Plaintiff William Claude Weston.

It is so Ordered this 4th day of September, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA



| | | |
|---|---|---|
| EVANS BOX MANUFACTURING CORP., Plaintiff | ) | |
| v. | ) | CIVIL ACTION NO. 78-C-485-C |
| UNITED STATES OF AMERICA, Defendant | ) | |

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed that the above-entitled action be dismissed with prejudice, each party to bear its own costs.

Richard T. Sonberg

Richard T. Sonberg, Esquire
Sonberg & Waddel, Inc.
907 Philtower Building
Tulsa, Oklahoma 74103
Attorney for Plaintiff

Hubert H. Bryant
United States Attorney

By: Lawrence Sherlock

Lawrence Sherlock
Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| DOROTHY BURD, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| EMPLOYERS MUTUAL CASUALTY COMPANY, | ) | |
| | ) | |
| Additional Party Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 78-C-165-C |
| | ) | |
| COLLECTRAMATIC, INC., | ) | |
| | ) | |
| Defendant. | ) | |

FILED

SEP 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

This cause came on for hearing on this 4th day of ~~August~~ September, 1979, upon the application of the plaintiffs for judgment. The Court, after being advised in the premises, finds that the plaintiffs have compromised and settled all of their claims and causes of action heretofore asserted against the defendant herein and that such compromise extinguishes all of the liability of the defendant to the plaintiff.

BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs, Dorothy Burd and Employers Mutual Casualty Company, have compromised and settled all of their claims and causes of action against the defendant, and have executed a release which extinguishes all of their claims and causes of action herein asserted by them against the defendant and that by reason thereof, the defendant is exonerated of and from all liability herein and is discharged to go hence without further delay.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED by the Court that each party shall stand the costs heretofore incurred by each in the prosecution of this action.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

K. D. BAILEY, Attorney for
Plaintiff, Dorothy Burd

BRUCE WINSTON, Attorney for
Additional Party Plaintiff,
Employers Mutual Casualty Company.

DAVID H. SANDERS, Attorney for
Defendant, Collectramatic, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | CIVIL ACTION NO. 79-C-477-D |
| LARRY D. PENDLETON, JR., Defendant. | ) | |

DEFAULT JUDGMENT

This matter comes on for consideration this 4th day of September, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Larry D. Pendleton, Jr., appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Larry D. Pendleton, Jr., was personally served with Summons and Complaint on July 27, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Larry D. Pendleton, Jr., for the sum of $670.34 (less the sum of $30.00 which has been paid), plus the costs of this action accrued and accruing.

Fred Daugherty
UNITED STATES DISTRICT JUDGE

ROBERT P. SANTEE
Assistant United States Attorney

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

EMMER BROTHERS, INC.,

Defendant.

CIVIL ACTION NO. 79-C-487-D

FILED

SEP 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

THIS MATTER, having come to be heard upon Plaintiff's Motion to Transfer Complaint,

IT IS HEREBY

ORDERED

1. That the above-captioned matter be transferred from the U. S. District Court for the Northern District of Oklahoma to the U. S. District Court for the Western District of Oklahoma.

2. The Clerk of Court shall make said transfer without the necessity of further direction as of the date of this ORDER.

3. The Defendant shall be granted twenty (20) days from the date of this order to answer the complaint.

Fred Daugherty

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARNEY SIMMONS, )
)
Plaintiff, )
) No. 79 C 195-D
vs. )
)
ST. LOUIS-SAN FRANCISCO )
RAILWAY COMPANY, )
)
Defendant. )

FILED
SEP 4 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff, Barney Simmons, and defendant, St. Louis-San Francisco Railway Company, stipulate the above and foregoing case may and should be dismissed with prejudice for the reason that the same has been fully settled and compromised.

Barney Wm Simmons
Barney Simmons, Individually
and as Administrator of the
Estates of Latricia Diana Simmons,
Deceased, and Danny Ray Simmons,
Deceased, Plaintiff

Attorney for Plaintiff

ST. LOUIS-SAN FRANCISCO RAILWAY CO.

By Riley W. Satterfield
Its Attorney

ORDER OF DISMISSAL WITH PREJUDICE

Upon the stipulation of the parties and for good cause shown, the above and foregoing case and all causes of action contained therein are dismissed with prejudice.

IT IS SO ORDERED.

DATED this 4 day of Sept, 1979.

/s/ FRED DAUGHERTY
U. S. District Judge